UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Appeal No. 81-24.

MONTGOMERY WARD & CO., INC.
Appellant,

THE UNITED STATES,
Appellant-Intervenor,

v.

ZENITH RADIO CORPORATION,
Appellee.

DECIDED: March 11, 1982

Before MARKEY, *Chief Judge*, RICH, BALDWIN, MILLER, and NIES, *Associate Judges*.

NIES, *Judge*.

Montgomery Ward & Company (Wards) and the Government as intervenor appeal from an order of the Court of International Trade requiring the Government to disclose to Zenith Radio Corporation (Zenith) a file compiled by the Customs Service during an investigation of Wards for possible violations of 19 USC 1592. We reverse and remand with instructions to dismiss this action for want of jurisdiction.

Background

This proceeding involves review of the discretionary action of the Secretary of Commerce and raises fundamental questions of the separation of powers between the Judicial and Executive Branches of Government. Zenith seeks to overturn a portion of settlement agreements under which the Secretary of Commerce, the Secretary of the Treasury, and the Attorney General compromised claims against 22 importers with respect to dumping duties imposed on these companies pursuant to T.D. 71-76, 5 Cust. Bull. 151 (1971), and civil penalty claims against four of these companies, including Wards, asserted

under 19 USC 1592. Zenith challenges only the legality of the agreements insofar as they relate to dumping duty claims which were not in litigation and which would be settled for approximately $66 million. [1] Zenith alleged two causes of action, the first that the Secretary of Commerce had no authority to settle claims for dumping duties under 19 USC 1617, and a second that, assuming the Secretary had such authority, the settlements were entered into in bad faith. On February 27, 1981, the court below granted the Government's motion for summary judgment on the first cause of action and denied summary judgment on the cause based on "bad faith."

Zenith alleges that the subject settlements are the culmination of years of utter disregard of the law by officials of the Executive Branch who have interfered with and frustrated enforcement of the Antidumping Act, that political considerations motivated the settlement rather than enforcement, that Zenith had no opportunity to be heard concerning the amount of duties which would be assessed, that the settlements violated its procedural rights under § 751 of the Tariff Act of 1930 (19 USC 1675), which was added by the Trade Agreements Act of 1979, and that it is aggrieved by its competitors' unlawful release from payment of hundreds of millions of dollars in dumping duties.

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[1] The Secretary of Commerce acted on behalf of the Government with respect to these claims. The Department of Justice settled the claims upon which actions had been brought for collection of unpaid duty assessments. Zenith does not attack the settlement of these claims by Justice even though settled on the same basis as those not in litigation. The Secretary of the Treasury was responsible for and settled the claims for civil penalities [*sic*] under 19 USC 1592 with respect to false documentation of entries. During the investigation into possible civil and criminal violations, the Government gave guarantees of confidentiality to Wards to avoid grand jury proceedings and Wards turned over a voluminous quantity of its business records under this agreement. It is this entire file (hereinafter "the Wards file") that is now being sought by Zenith.

Zenith asserts that the Government's estimate of $138.7 million as the possible amount of dumping duties which might be collected was low, and that any belief by the officials in the legal weakness of the Government's case against the importers with respect to the Government's method of calculating such duties was unfounded.

Zenith further asserts that the Government of the United States and the Government of Japan entered into a secret side agreement at the time of the Orderly Marketing Agreement entered into between the countries in May 1977 in which the United States agreed to assess dumping duties in conformity with the International Antidumping Code, notwithstanding that the Code differs from our national legislation.

Finally, Zenith asserts that the settlement agreement falsely states that the United States knew of no violation of law relating to or arising from the importation of Japanese television receivers.

Zenith's original complaint, filed June 27, 1980, was based upon rights under section 516A(a)(2) of the Tariff Act of 1930 (19 USC 1516a(a)(2)), and asserted jurisdiction in the court under 28 USC 1581(c). In its amended complaint filed November 3, 1980, it added an allegation that the action was brought pursuant to 5 USC 772 et seq. [sic, the Administrative Procedure Act, 5 USC 702 et seq., hereinafter APA], jurisdiction being conferred by 28 USC 1581(i). [2] However, the remaining allegations of the complaint were unchanged except for minor details and the addition of a specific pleading that it would be adversely affected or aggrieved by the favorable settlement of the claims against its competitors.

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[2] 28 USC 1581(i) was enacted as part of the Customs Courts Act of 1980, Pub. L. No. 96-417, § 301, 94 Stat. 1729, which took effect October 1, 1980.

Discovery Proceedings in the Court of International Trade

On July 2, 1980, Zenith served interrogatories and a request for production of documents upon the Government. The Government moved for an order relieving it of the obligation to respond, urging that judicial review should be limited to the record made by the agency. The court denied that motion on August 20, 1980.

Zenith moved on October 25, 1980, for an order preliminarily enjoining implementation of the settlement agreements. The Government opposed, again moving for an order relieving it of the obligation to respond to discovery.

On December 9, 1980, the court issued an injunction pendent lite, preliminarily enjoining implementation of the settlement agreements, stating that Zenith had "made out a substantial case on the merits of its alternative second [bad faith] cause of action." *Zenith Radio Corp. v. United States*, 1 CIT ____, Slip Op. 80-10, 505 F. Supp. 216, 219 (1980).

On December 12, 1980, the court denied the Government's second motion, holding that Zenith had "made a sufficiently strong showing of bad faith so as to warrant discovery" [3] and directed the Government to respond to Zenith's discovery demands. *Zenith Radio Corp. v. United States*, 1 CIT ____, Slip Op. 80-11, 15 Cust. Bull. & Dec., No. 1, 29 (1980). The administrative record was timely filed on January 27, 1981,

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[3] No findings were made to support the order. The court referred to the showing made by Zenith to obtain a preliminary injunction. The December 9, 1980 order of the court granting that injunction (Slip Op. 80-10) states without particularizing what facts it relied upon:

> Based on these facts which are largely uncontroverted, the court is of the view that plaintiff has made out a substantial case on the merits on its alternative second cause of action . . . .

and, accordingly, had not been reviewed at the time of the court's order of December 12, 1980. [4]

The Government continued to resist production of documents outside the administrative record in connection with its motion for summary judgment and submitted affidavits to overcome Zenith's showing of "bad faith." Zenith moved for an order compelling production. Among the documents sought was the Investigative file compiled by the Customs Service during its § 1592 investigation of Wards (Wards file). Wards was permitted to intervene for the sole purpose of opposing the motion for production of that file.

On May 13, 1981, the court granted Zenith's motion for production, under a protective order. Its motion for reconsideration being denied on June 18, 1981, Wards appealed. On July 7, 1981, this court granted a stay of the May 13, 1981 order.

Positions of the Parties on Appeal

Zenith argues that the subject discovery order is interlocutory and, therefore, not subject to review at this time. Zenith further contends that the court below did not abuse its discretion in going beyond the record and granting discovery

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[4] Section 706 (APA) which is specifically applicable under 28 USC 2640(d), provides:

> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Under *Camp* v. *Pitts*, 411 U.S. 138, 141-43 (1973), it is clear that the starting point for any review must be the administrative record. It is only with the administrative record before the court, supplemented if necessary by affidavits from the appropriate officials, that a decision can be made on the strength of a "bad faith" showing and the necessity for further discovery. *See also Quincy Oil, Inc.* v. *FEA*, 468 F. Supp. 383 (D Mass. 1979).

because of the strength of its showing of bad faith. Zenith maintains that the allegations set out above are strong indicators of bad faith by the Government which justify setting aside the settlement.

It appears that Zenith's theory of "bad faith" stems from a meeting in Honolulu in 1972 between President Nixon and Prime Minister Tanaka of Japan at which trade matters were discussed. [5] Zenith concludes that a secret agreement must have been entered into at that meeting whereby the United States agreed to non-enforcement of U.S. antidumping laws with respect to television sets from Japan in exchange for Japan's increased purchases of U.S. agricultural products. Zenith's conclusion is based on a rumor that the U.S. agreed to "take a dive" on color TV's; Japanese press stories expressing concern over U.S. antidumping laws; newspaper reports that Japan agreed to purchase more U.S. farm products; newspaper reports that trade issues were a high priority at the 1972 meeting; and Department of Agriculture statements encouraging exports to Japan.

Wards' position on appeal is that the court has jurisdiction to review the discovery order; that Zenith's "showing of bad faith" is manifestly insufficient to justify any discovery; that the Wards file is irrelevant to the dumping duty settlement; that the court abused its discretion in not recognizing Wards' private interest and the strong public interest in the continued confidentiality of documents compiled in the Wards file; that Zenith has no standing to challenge the settlement of claims under 19 USC 1592; and that if any discovery should be permitted, the scope of discovery being pursued is greater than can be justified by need or relevance. [6]

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[5] Brief in Support of Plaintiff's Cross-Motion for Partial Summary Judgment on its First Cause of Action and in Opposition to Defendant's Motion to Dismiss, filed October 10, 1980, at 15.

[6] Because we dispose of this case on other grounds, we need not reach Wards' and the Government's arguments concerning the confidentiality of the Wards file or any applicable privilege. See e.g., *Black* v. *Sheraton Corp. of America*, 564 F.2d 550 (CA D.C. 1977).

The Government was permitted to intervene in this appeal in support of appellant Wards. In addition to endorsing Wards' views, the Government asserts that, this appeal being properly before this court, we possess jurisdiction to review the merits of the trial court's decision to allow Zenith to conduct discovery; that the discovery permitted expands the parameters of judicial review of agency action as defined in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), and *Camp* v. *Pitts*, 411 U.S. 138 (1973); that the court's ordering discovery without review of the administrative record and without an explanation of its reasons for accepting Zenith's "flimsy" allegations was manifest error; that a non-party to a settlement agreement has no standing to challenge its merits and, in particular, Zenith has no special interest in the settlement of the § 1592 claims; and, finally, that the order violates the Executive privilege.

OPINION

I

In this appeal, Wards properly focuses on the validity of the discovery order with respect to the Wards file, Wards not being a party to the proceeding below. However, we agree with the Government that if an appeal by Wards lies in this court with respect to the discovery order, this court may properly, indeed must, review the authority underlying the discovery order, where fundamental jurisdictional questions have been raised with respect to Zenith's standing and the permissible scope of judicial review. [7]

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[7] In any case properly before it for appellate review, an appellate court is obliged to notice want of jurisdiction in the court below sua sponte if not raised by a party, *Louisville & N.R. Co.* v. *Mottley*, 211 U.S. 149 (1908); *Cameron* v. *Hodges*, 127 U.S. 322 (1888); *Mansfield, C&L.M. Ry* v. *Swan*, 111 U.S. 379 (1884), and may, in any event, assume jurisdiction for the limited purpose of determining jurisdiction. *United States* v. *United Mine Workers*, 330 U.S. 258, 289-95

Accordingly, we first determine whether this appeal is properly before this court.

II

Appealability of Discovery Order

Citing a long line of cases including *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338, 341-42 (CA 10 1976), *cert. denied*, 429 U.S. 1096 (1977), and *N.C. Asso. of Black Lawyers* v. *N.C. Board of Law Examiners*, 538 F.2d 547, 548-49 (CA 4 1976), Zenith argues that the subject discovery order is interlocutory and thus not appealable as a matter of right. Acknowledging that an interlocutory order may be considered final in some circumstances, Zenith says Wards' arguments for finality are neither collateral to the underlying litigation [8] nor based on a recognized privilege against disclosure.

Interlocutory discovery orders are normally not appealable. Courts have recognized, however, an exception where, as here, the information sought is in custody of a third party and the putative appellant can neither resist nor force the custodian to resist compliance with the discovery order. *See*, e.g.,

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(1947). Also, while parties are not necessarily entitled to a hearing on this issue, *see*, e.g., *Kamsler* v. *Zaslawsky*, 355 F.2d 526 (CA 7 1966), we view the arguments concerning scope of review sufficient to call into question the jurisdiction of the court below. Indeed, where "[t]he questions [Zenith] presents are outside the narrow scope of review permitted . . . we must dismiss for want of jurisdiction." *Carter* v. *Cleland*, 643 F.2d 1, 2 (CA D.C. 1980). *See also Garcia* v. *Neagle*, 660 F.2d 983 (CA 4 1981).

[8] The "Collateral Order" doctrine, established in *Cohen* v. *Beneficial Ind. Loan Corp.*, 337 U.S. 541 (1949), permits an interlocutory order to be deemed a final order for the purpose of appellate review where, inter alia, the order is based on a claim separable from, and collateral to, the rights asserted in the underlying cause of action. *Id.* at 546-47.

Perlman v. *United States*, 247 U.S. 7, 12-13 (1918); *In re Berkley & Co.*, 629 F.2d 548, 551 (CA 8 1980); *In re Matter of Grand Jury Applicants, C. Schmidt & Sons.*, 619 F.2d 1022, 1024-25 (CA 3 1980); *United States* v. *RMI Corp.*, 599 F.2d 1183, 1186-87 (CA 3 1979). In such circumstances, denial of an appeal precludes all opportunity for review, unlike the normal discovery situation in which compliance can be refused and the order challenged on appeal from a resulting contempt finding.

Contrary to Zenith's argument, the courts have not limited interlocutory appeals of discovery orders to those involving assertions of absolute or constitutional privileges. Indeed, appeals have been permitted when based on an interest in continued confidentiality of business records. *See*, e.g., *United States* v. *RMI Corp.*, supra.

That Wards does not assert an absolute privilege is thus irrelevant to the issue of whether the subject order is appealable. Wards has no power to compel Government acceptance of a contempt citation in protection of its confidential business information. That inability, coupled with Wards' interest in continued confidentiality of its information, is sufficient to confer a right of appeal. Though Zenith distinguishes *RMI*, supra, saying that the discovery order there permitted disclosure to competitors and was not limited, as here, to opposing counsel, we are not persuaded that that distinction alone renders the present order non-final. A contrary view, by totally defeating Wards' opportunity for review, would conflict directly with the Court's rationale in *Perlman*, supra.

Having concluded that the appeal now before us is proper, we turn to the reasons for our holding that the court below lacks jurisdiction in this case.

III

Statutory Authority for Settlement

Consideration must first be given to the pertinent statute governing the Secretary's action. The authority for settlement

of antidumping proceedings is provided by section 617 of the Tariff Act of 1930, as amended (19 USC 1617), which states:

> Upon a report by a customs officer, United States Attorney [*sic*] or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of [*sic*] recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claims [*sic*], if such action shall be recommended by the General Counsel for the Department of the Treasury.

The responsibility for administration of the antidumping laws was transferred from the Secretary of the Treasury to the Secretary of Commerce by Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69273 (1979), including, specifically, the authority to compromise claims under § 1617 (§ 5(a)(1)(G)). [9]

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[9] The Secretary of Commerce received the aforesaid powers of the Secretary of the Treasury and of the General Counsel. By notice dated April 28, 1980, which partially delegated this authority, the Secretary of Commerce stated:

> I shall as Secretary of Commerce retain and exercise all authority under law to decide any compromises of claims existing under T.D. 71-76.
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> 2. I hereby delegate to the General Counsel of the Department of Commerce the authority to recommend any compromises of claims arising under the customs law, as provided in 19 U.S.C. 1617 and transferred to the Secretary under the aforesaid Reorganization Plan and Executive Order. This authority shall apply in the matter of claims under T.D. 71-76, and any subsequent matters arising under 19 U.S.C. 1617.

45 Fed. Reg. 29623 (1980).

IV

Jurisdiction of Court Below to Review Settlement

a.

We find no basis for review under 28 USC 1581(c) and 19 USC 1516a arising by Zenith's attack on the settlement agreement under 19 USC 1675. [10] 19 USC 1516a provides for judicial review of certain "determinations," including those made under § 1675. Such "determinations" must be made in accordance with delineated procedures and must be based on specific factual findings and legal conclusions. Thus, the merits of a determination, as well as its procedural correctness, are subject to judicial review. A settlement agreement is not an administrative review of an antidumping order resulting in a "determination" under 19 USC 1675. Unlike a "determination," the Government may not impose a settlement agreement as of right. Moreover, the basis for a decision to settle cannot be supported by factual findings or legal conclusions which indicate that the decision to accept a particular amount or particular terms in satisfaction of a disputed claim is or is not correct. [11] Finally, Zenith does not assert and we do not see any

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[10] Under 19 USC 1675, existing antidumping orders are reviewable by the administering authority. Whenever a review is conducted, any interested party is entitled to a hearing and may contest the underlying factual findings or legal conclusions by suit against the Government in the Court of International Trade. Zenith does not assert that it was denied any rights in connection with the issuance of T.D. 71-76 or subsequent administrative review procedures. Moreover, T.D. 71-76 is neither negated nor revoked in whole or in part by the settlement. It continues in effect and is currently operative.

[11] The correctness of a settlement agreement is, of course, properly subject to review by the appropriate oversight committees of the Congress; and if a violation of criminal law is suspected, the matter is properly within the jurisdiction of the United States Department of Justice.

basis for asserting that settlement comes within any of the other statutory categories of reviewable "determinations" set forth in § 1516a. Therefore, while the statute provides under 1516a a right of review to certain persons "aggrieved or adversely affected" by "determinations" as specified therein, we hold that the Court of International Trade has no jurisdiction under 28 USC 1581(c) to review a settlement agreement.

b.

Zenith's alternative basis for review by the Court of International Trade, 28 USC 1581(i), provides in pertinent part:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
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> (1) revenue from imports or tonnage;
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> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
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> * * *
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> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

This section must be read in conjunction with 28 USC 2631(i):

> Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)-(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5.

and 28 USC 2640(d):

> In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5.

The purpose of 28 USC 1581(i) is shown in the legislative history as follows:

> This section [1581(i)] granted the court jurisdiction over those civil actions which arise directly out of an import transaction and involve one of the many international trade laws. The purpose of this section was to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the federal district courts and the Court of International Trade. This language made it clear that all suits of this type are properly commenced only in the Court of International Trade and not in a district court. Thus, the Committee did not intend to create any new causes of action, but merely to designate definitively the appropriate forum.
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> * * *
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> However, subsection (i), and in particular paragraph (4), makes it clear that the court is not prohibited from entertaining a civil action relating to an antidumping or countervailing duty proceeding so long as the action does not involve a challenge to a determination specified in section 516A of the Tariff Act of 1930. [12]

Thus, we have no doubt that Congress intended that the Court of International Trade, and not a district court, have jurisdiction of civil actions for review of administration and enforcement of the antidumping statute to the extent appropriate under the APA.

Where jurisdiction is asserted under 1581(i), the court must not accept the allegations at face value but must determine the thrust of the complaint. *Royal Business Machines, Inc.* v. *United States*, No. 81-12 (CCPA January 21, 1982). Jurisdiction under 1581(i) cannot be made a resting ground for judicial review of activities neither contemplated nor permitted by Congress.

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[12] H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 33, 48, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3729, 3745, 3760.

With respect to discretionary acts of the Executive, *United States* v. *Morgan*, 313 U.S. 409 (1941), and other authority discussed herein indicate that the extent of permissible judicial review, that is, a court's jurisdiction, varies with the statutory grant to the Executive. [13] In summary, if action is committed by law to the discretion of the Executive, no review is permitted. If action is committed by law to discretion but procedural requirements are imposed, the satisfaction of procedural requirements, but only these, may be judicially reviewed. If an action is discretionary but there is law from which a court may determine that the exercise of discretion is arbitrary, capricious, or not in accordance with law, the decision itself may be reviewed on that limited basis. For reasons to be discussed, we conclude that the scope of judicial review with respect to the subject settlement agreement is limited to determining whether procedural requirements have been satisfied.

Scope of Review

Review of agency action is authorized under 5 USC 702 as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

No specific statutory right is provided for judicial review of the merits of a settlement pursuant to 19 USC 1617. However, the Supreme Court in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968), indicated that no explicit provisions for review may be necessary in some instances. "[W]hen the particular statutory provision invoked [that is, alleged to be violated] does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision." *Id.* at 6.

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[13] *See* n. 7, supra.

Zenith asserts that the legislative purpose of the Antidumping Act is to protect domestic industry, in this case the particular interests of Zenith. The thrust of its complaint, that is, the alleged "legal wrong", is that the settlement is part of an alleged course of conduct by the Government of nonenforcement of the law for many years. It characterizes the settlement as the "culmination" of nonenforcement in that its competitors have been released from payment of hundreds of millions of dollars in duties.

The premise of Zenith is untenable. Settlement is a tool of enforcement of the law, here specifically granted to the Secretary of Commerce in conjunction with the transfer to him of responsibility for enforcement of the Antidumping Act. Accepting Zenith's position would deprive the Secretary of any power to settle these claims without Zenith's consent as well as the consent of others in the industry. 19 USC 1617 contains no such limitation.

In enforcing the law the Secretary is not providing a private remedy but acting in the public interest. *See Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265 (1940). It is for the Secretary, not the Court of International Trade, to determine that the overall purposes of the Act are best served by the terms of a settlement. Thus, the frustration of Zenith's desire that its competitors pay a greater sum in dumping duties than the settlement provides is not a "legal wrong" resulting from "agency action" of which courts can take cognizance. *See FTC* v. *Standard Oil of California*, 449 U.S. 232, 247-49 (1980), (Stevens, J., concurring).

In no previous case has a court assumed jurisdiction at the behest of a third party to review the merits of a settlement agreement entered into by the Government with its competitor. The only precedent we find for setting aside a settlement is where the court has found that the complainant was deprived of its statutory right to a hearing on the merits of the underlying case prior to settlement. *See International Bro. of Teamsters* v. *NLRB*, 339 F.2d 795 (CA 2 1964), and cases cited

therein. This is in accord with the directive of the Supreme Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), that discretionary action cannot be reviewed if "there is no law to apply." *Id.* at 410. *See also Santa Clara* v. *Andrus*, 572 F.2d 660, 668 (CA 9), *cert. denied*, 439 U.S. 859 (1978); *Ness Invest. Corp.* v. *USDA*, 512 F.2d 706, 715-16 (CA 9 1975). No situation is more within the category of "no law to apply" than the multifaceted judgmental decision to settle a claim. Thus, the substance of the settlement is clearly outside the scope of judicial review. The only law to apply here is set forth as procedural requirements in 19 USC 1617, and any legal wrong to Zenith must be based on the Secretary's violation of the procedures set forth therein.

Zenith does not dispute that the procedures set out in 19 USC 1617 were followed [14] but asks the court to find that the procedures of 19 USC 1675 are superimposed, thus giving it a right to a hearing which it says would encompass the terms of settlement. We see no reasonable basis for placing such a limitation on the Secretary's authority under the statute and conclude there is none. This conclusion is in accord with the recent decision of the Supreme Court in *Watt* v. *Energy Action Education Foundation*, 50 USLW 4031 (December 1, 1981) (No. 80-1464), where the Court refused to restrain the Secretary of the Interior's discretion in connection with experimentation in awarding offshore oil rights by resort to another statute which laid out criteria for the program generally.

Similarly here, the challenge to the Secretary's action must be directed to 19 USC 1617 exclusively. Under 19 USC 1617, Zenith was not entitled to a hearing or to be consulted regarding the considerations entering into the terms accepted by the Secretary in settlement of these claims. Its right of participation ended with the issuance of T.D. 71-76 (except as provided

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[14] 19 USC 1617, quoted supra, requires only a report of an appropriate Customs official and a recommendation of the General Counsel.

under 19 USC 1675 discussed supra). Thus, Zenith has no grounds for asserting that its procedural rights to a fair hearing were denied, unlike the plaintiffs in the authority cited in the opinion of the court below. *See*, e.g., *Singer Sewing Machine Co.* v. *NLRB*, 329 F.2d 200 (CA 4 1964); *Ruppert* v. *Washington*, 366 F. Supp. 686 (D.D.C. 1973), *aff'd*, 543 F.2d 417 (CA D.C. 1976); *Jarrott* v. *Scrivener*, 225 F. Supp. 827 (D.D.C. 1964).

Zenith would also have us look behind the apparent regularity of the procedures into the motives for settlement. In *United States* v. *Morgan*, supra, 313 U.S. at 421-22 *(Morgan IV)* the Supreme Court stated:

> And so we conclude that the order of the Secretary furnishes "the appropriate basis for action in the district court in making distribution of the fund in its custody." *United States* v. *Morgan*, 307 U.S. 183, 198. But, finally, a matter not touching the validity of the order requires consideration. Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." *Morgan* v. *United States*, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, *compare Fayerweather* v. *Ritch*, 195 U.S. 276, 306-07, so the integrity of the administrative process must be equally respected. *See Chicago, B. & Q. Ry. Co.* v. *Bab-*

> *cock*, 204 U.S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States* v. *Morgan*, 307 U.S. 183, 191.

In an earlier stage of the litigation, *Morgan* v. *United States*, 304 U.S. 1 (1938), in order to resolve whether there had been *procedural irregularities*, that is, whether there had been a hearing as required by law, examination of the Secretary and receipt of other evidence had been permitted. But in *Morgan IV* the Court clearly rejected the argument that probing into reasoning or motivation was appropriate as part of a procedural inquiry.

These same principles must be applied in this case. At most, Zenith may press inquiry into whether the statutory procedural requirements for settlement were satisfied. *See Watt* v. *Energy Action Education Foundation*, supra; *Sneaker Cicus* [*sic*], *Inc.* v. *Carter*, 566 F.2d 396 (CA 2 1977). It may not, however, be allowed to inquire into the merits of the settlement or into the Secretary's mental processes in deciding upon settlement in the guise of a challenge to procedure. Zenith's requests for discovery bear out that this is its objective. [15] The request for the Wards file bears on what figures the Secretary may have considered in arriving at settlement. Proving that the estimate in the report to him was lower than what Zenith considers reasonable does not destroy the lawfulness of his decision. Currency fluctuations can play a role in evaluation. Moreover, the dollar amount agreed upon may have been the best figure which could be negotiated regardless of the size of the claim. In any event, it may well be that other considerations were of greater significance than the precise dollar

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[15] Zenith has previously requested: documents of and/or concerning Admiral Bobby Inman, Acting Director of the CIA; State Department documents; Special Trade Representative documents; and the Presidential papers of Presidents Nixon, Ford, and Carter.

amount of the Government claims. The settlement agreement required more from the importers than the payment of money. Not only were any possible challenges to the assessment of duties expressly waived, but also concessions were obtained requiring cooperation in submitting data and information with respect to future enforcement. A tremendous backlog of cases was inherited by the Secretary which may well have interfered with current work of his Department not only in this area but in all areas of his responsibility under the Act. We do not know what weight he gave to each of these considerations [16] and, in any event, these are not matters for which the court may demand answers. To require an explanation for this type of discretionary Executive action fundamentally changes the nature and scope of judicial review. Moreover, a court cannot infer fraud or bad faith because the Secretary did not achieve as advantageous a settlement as the court may believe could have been made. Nor is it appropriate to infer bad faith in the Secretary's decision from the alleged transgressions of predecessors. The decision to settle under attack here was required to be and was the personal decision of the Secretary. *See* note 9 supra. Zenith includes in its complaint no more than perfunctory allegations of impropriety in the actions by the Secretary and his advisors. [17]

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[16] As the Court of Claims has noted in *Pennsylvania* v. *United States*, 643 F.2d 758, 764, *cert. denied*, 50 USLW 3246 (October 6, 1981) (No. 80-1978):

> The true liability that a lawsuit poses is rarely susceptible of precise quantification prior to final judgment. Both parties in litigation may encounter unforeseen difficulties of proof. The skill of opposing counsel and the resources each side can devote to the conflict may be additional unknowns. Moreover, no party can be precisely certain of the interpretation the trier of fact will give to either the facts or the law. All of these factors are difficult to quantify . . . .

[17] It is also apparent from the record which has been subsequently developed that Zenith is unable or unwilling to add any substance to its charges against these officials. In answer to the Government interrogatory asking Zenith to state the basis of the allegation that:

The admonition of Judge Tamm in *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 123 (1978), is appropriate here:

> The speculative possibility that the Administrator accepted the staff view, not because he was persuaded by the evidence, but for some improper reason, fails to overcome the strong presumption of regularity. To accept petitioner's invention to pierce the presumption on this basis would be to alter radically the nature of judicial review.

The Zenith complaint is manifestly not directed to correction of procedural irregularity. It does not seek to have the settlement set aside until the requirements of 19 USC 1617 are properly met. Rather it seeks through the power of the court to prevent settlement.

We hold that such an action is not within the jurisdiction of the court under 28 USC 1581(i).

CONCLUSION

The order appealed from is *reversed* and this case is *remanded* to the Court of International Trade with directions to dismiss this action for lack of jurisdiction.

REVERSED AND REMANDED

> [N]either the Secretary of Commerce in deciding to settle the alleged claims nor those Government officials who had the statutory responsibility to recommend settlement exercised the independent judgment contemplated by Congress in enacting section 617.

Zenith's response was:

> Objection. This interrogatory calls for the premature disclosure of plaintiff's evidence. Considering the nature of plaintiff's allegations in this action, it would unduly prejudice plaintiff's discovery efforts and trial preparation to answer this interrogatory at such an early point in the pretrial proceedings.

When required to answer under court directive, Zenith merely referred to conclusory statements made in various of its own briefs or motions.

Slip Op. 81-44

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: HON. HERBERT N. MALETZ, JUDGE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Order
Dated: May 13, 1981

Upon consideration of plaintiff's motion to compel defendant to respond to plaintiff's first interrogatories, plaintiff's motion to compel defendant to respond to plaintiff's first request for production of documents, and defendant's opposition to those motions, and upon consideration of defendant's motion to compel plaintiff to respond to defendant's first interrogatories, defendant's motion to compel plaintiff to respond to defendant's first request for production of documents, and plaintiff's opposition to those motions, and upon all other papers and proceedings, after oral argument, the Court makes the following rulings:

I. On Plaintiff's Motion to Compel

A. Documents Relating To Investigation Into Possible Violations Of 19 U.S.C. 1592.

(1) Within 30 days, defendant shall make available, subject to the protective provisions contained in Part IV of this order, the documents covered by plaintiff's first request for production of documents concerning Sears, Montgomery Ward, and White Stores.

(2) Plaintiff will make application within 15 days to the United States District Court for the Eastern District of Virginia for an order modifying that court's protective order entered on April 23, 1980, in *In Re 1978 Grand Jury Proceedings J.C. Penney Company, Inc.*, and authorizing the defendant to make available to plaintiff's counsel for use in this judicial proceeding, subject to the protective provisions of Part IV of this Order, all documents in the defendant's possession which are at present subject to the aforesaid district court's order of April 23, 1980.

(3) Acting Commissioner Archey's claim of privilege for the remaining penalty documents is denied without prejudice on the ground that the privilege has not been properly claimed.

(4) Acting Commissioner Archey is allowed 30 days within which to file a proper claim of privilege for each of such penalty documents and to transmit to the court within that time for examination by the court in camera each document for which privilege is claimed.

B. Other Documents With Respect To Which Defendant Has Claimed A Privilege.

(1) Defendant shall transmit to the court within 15 days for examination by the court in camera the two in camera affidavits referred to in the affidavit of Admiral Bobby Inman, the Acting Director of the Central Intelligence Agency.

(2) The State Department documents for which a claim of privilege has been made by the Secretary of State shall be transmitted to the court within 15 days for examination by the court in camera.

(3) The Special Trade Representative documents for which a claim of privilege has been made shall be transmitted to the court within 15 days for examination by the court in camera.

C. Presidential Papers.

Plaintiff's motion for discovery of the Presidential papers of Presidents Nixon, Ford and Carter is denied without prejudice.

D. Other Documents Encompassed Within Plaintiff's First Request For Production Of Documents.

Defendant shall within 30 days make available for discovery, pursuant to the protective provisions contained in Part IV of this Order, the remaining documents covered by plaintiff's first requests for discovery. Draft protest decisions shall be included among the documents thus made available.

E. Plaintiff's First Interrogatories.

Defendant shall within 30 days supply answers to plaintiff's first interrogatories.

II. On Defendant's Motion To Compel

Defendant's motion to compel discovery pursuant to its first request for production of documents and its first interrogatories is allowed, with the exception of those interrogatories and documents covering communications between plaintiff and members of Congress. The court is of the view that at this stage the relevance of such communications seems borderline and the burden of complying unduly great. See 4 Moore's Federal Practice, pp. 26-135. Accordingly, the court sustains the objection of discovery of such communications without prejudice. With the foregoing exception, plaintiff shall respond to defendant's first interrogatories and request for production of documents within 30 days.

III. The Time Periods Specified Above May Not Be Extended Except For Good Cause Shown.

IV. Protective Provisions

a. All of the information contained in the documents shall be deemed to be protected information. Should plaintiff's counsel believe that a particular document or item contained in a document is not entitled to confidential treatment, plaintiff's

counsel shall not disclose the document or item and shall consult with defendant's counsel. If defendant's counsel agrees that the document or item does not appear to be confidential, plaintiff's counsel shall not disclose the document or item for three business days after receipt of the opinion of defendant's counsel so as to permit the individual or entity which submitted the document to apply for intervention for the purpose of filing an objection to disclosure with the Court. If such an application is filed, plaintiff's counsel shall not disclose the document or item until the Court rules upon the application and the objection. If defendant's counsel objects to, or fails to respond in a timely manner to plaintiff's counsel's request for disclosure of the document or the item, plaintiff's counsel shall not disclose the document or item until the differences between plaintiff's and defendant's counsel have been resolved by the Court.

b. Plaintiff's counsel may disclose the protected information to their legal associates and office personnel actively assisting in the litigation, but shall not disclose the protected information, directly or indirectly, to anyone else, except as provided by this Order.

c. If, in the opinion of plaintiff's counsel, it becomes necessary to consult with experts in evaluating the protected information, they shall, before any disclosure, notify and obtain the consent of defendant's counsel to disclosure to identified experts who shall agree not to disclose what they learn from the documents containing the protected information; if after seven (7) days following notification of defendant's counsel, counsel for the respective parties cannot agree upon the need for an expert or upon a suitable expert, plaintiff's counsel may submit the matter to the Court for resolution.

d. Any persons obtaining access to such protected information shall not make copies or reveal the contents of the documents containing the protected information, or use the protected information obtained for any purpose other than for the purpose of this litigation. Nothing in this Order shall preclude disclosure of the documents or the protected information con-

tained in them to an individual or entity which was the source of the information.

e. Henceforth, should any party to this case file with the Court any document containing information which is protected by this Order, either (1) directly pursuant thereto, or (2) by incorporation through separate agreement between the parties, said party shall request the Clerk of the Court, or an employee of his office, to seal said document and to restrict access thereto to counsel for the parties and the Court personnel authorized access thereto by the Court.

f. The party filing such document as described in paragraph e, *supra*, will, unless there is no unprotected material which is reasonably segregable from the protected information, in addition to filing the number of such documents as prescribed by the Rules of the United States Court of International Trade, file an additional copy of the document, with the protected information deleted, for inclusion in that part of the Court file to which the general public has access.

g. Any party filing a document containing protected information shall indicate conspicuously thereon that the document contains information protected by a protective order.

h. Any party filing a copy of a document, with protected information deleted from said copy, in accordance with paragraph f, *supra*, shall indicate conspicuously on said copy that certain protected information has been deleted therefrom and where such deletions have been made on the copy.

i. Should a request for the sealing of a document, as described in paragraph e, *supra*, be made of the Clerk of the Court or of an employee of his office, such request shall be honored.

j. Upon conclusion of this litigation, Mr. Ikenson and Mr. Curtis shall return to defendant's counsel all documents, then in Mr. Ikenson's and Mr. Curtis' possession, containing protected information and any copies made of such documents, including any documents or copies held by persons authorized

under paragraphs a and b, *supra*, to have access thereto, except for copies which contain work notes of counsel for plaintiff or other authorized persons. These latter documents shall be destroyed. Mr. Ikenson may retain one copy of all briefs and other documents filed by or with the Court which contain protected information.

k. Nothing in this Order shall preclude the parties from seeking such further orders of the Court as may be necessary to provide for further sealing and/or opening for public inspection of any documents or other things covered by this Order.

/s/ Herbert N. Maletz
Judge

New York, New York

May 13, 1981

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

MONTGOMERY WARD & CO., INCORPORATED,

Intervenor for Limited Purpose.

Order

Upon consideration of intervenor's motion (a) for reconsideration of this court's order of May 13, 1981 granting plaintiff's motion to compel discovery of the defendant's files concerning its investigation of intervenor pursuant to 19 U.S.C. § 1592 and (b) in the alternative, for a stay pending appeal of the aforesaid order, upon consideration of plaintiff's memorandum in opposition thereto, and upon all other papers and proceedings had herein, it is hereby ordered:

1. That intervenor's motion for reconsideration is denied; and

2. That intervenor's motion in the alternative for a stay pending appeal is denied.

/s/ Herbert N. Maletz,
HERBERT N. MALETZ, Judge

June 18, 1981

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Appeal No. 81-24.

MONTGOMERY WARD & CO., INC.

Appellant,

THE UNITED STATES,

Appellant-Intervenor,

v.

ZENITH RADIO CORPORATION,

Appellee.

ON PETITION FOR REHEARING

Before MARKEY, Chief Judge, RICH, BALDWIN, MILLER, and NIES, Associate Judges.

Order

Appellee's Petition for Rehearing, Amici's Brief in Support, and Appellant's and Appellant-Intervenor's Responses thereto having been considered, the petition is granted to the extent that the court's opinion of March 11, 1982, is modified by inserting the following footnote "1.1" with the signal to follow "bad faith" in line 12, page 2 of the slip opinion:

[1.1] The thrust of Zenith's first cause of action is found in the following paragraphs of its complaint:

> 29. Section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617) does not provide any authority for the settlement of the alleged claims related to the importation of television receivers from Japan, for the avoidance of the procedures specified by Congress in section 751 of the Tariff Act of 1930, relating to the determination and assessment of antidumping duties on entries subject to findings of dumping, and for the avoidance of the assessment of antidumping duties in accordance with the statutory command of the antidumping provisions of the law.

30. The subject settlement constitutes an unlawful attempt by officials of the United States Government (a) to deprive the plaintiff of the opportunity to be heard before substantive determinations involving the amounts of antidumping duties to be assessed on merchandise subject to an existent dumping finding were made, (b) to deprive the plaintiff of the right of judicial review over such determinations, and (c) to oust this Court of jurisdiction to review such determinations, which opportunity to be heard, which right to judicial review, and which jurisdiction were clearly conferred by Congress in the Trade Agreements Act of 1979.

General allegations that "determinations" were not made or were improperly made are incorporated into both causes of action.

The petition for rehearing is, in all other respects, denied. Appellee's motion for oral argument on its Petition is also denied.

FOR THE COURT

/s/ Howard T. Markey
HOWARD T. MARKEY
Chief Judge

Date: May 13, 1982

MILLER, Judge, would grant rehearing.

Statutes Involved

Section 201(a) of the Antidumping Act of 1921, as amended (19 U.S.C. § 160(a) (1970) (amended 1975; repealed 1979)):

Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160 to 171 of this title called a "finding") of his determination and the determination of the said Commission. For the purposes of this subsection, the said Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

Section 201(c) of the Antidumping Act of 1921, as amended (19 U.S.C. § 160(c) (1970) (amended 1975; repealed 1979)):

The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the United States Tariff Commission, upon making its determination under subsection (a) of this section, shall each publish such determination in the Federal Register, with a statement of the reasons therefor, whether such determination is in the affirmative or in the negative.

Section 202(a) of the Antidumping Act of 1921, as amended (19 U.S.C. § 161(a) (1970) (repealed 1979)):

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

Section 516A of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a):

(a) Review of determination

(1) Review of certain determinations

(A) Thirty-day review

Within 30 days after the date of publication in the Federal Register of notice of—

(i) a determination by the Secretary or the administering authority, under section 1303(a)(3), 1671a(c), or 1673a(c) of this title, not to initiate an investigation,

(ii) a determination by the administering authority or the Commission, under section 1675(b) of this title, not to review an agreement or a determination based upon changed circumstances, or

(iii) a negative determination by the Commission, under section 1671b(a) or 1673b(a) of this title, as to whether there is reasonable indication of material injury, threat of material injury, or material retardation,

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) Ten-day review

Within 10 days after the date of publication in the Federal Register of notice of—

(i) a determination by the administering authority, under section 1671b(c) or 1673b(c) of this title, that a case is extraordinarily complicated, or

(ii) a negative determination by the administering authority under section 1671b(b) or 1673b(b) of this title,

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(2) Review of determinations on record

(A) In general

Within thirty days after the date of publication in the Federal Register of—

(i) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or

(ii) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B),

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days

thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) Reviewable determinations

The determinations which may be contested under subparagraph (A) are as follows:

(i) Final affirmative determinations by the Secretary and by the Commission under section 1303 of this title, or by the administering authority and by the Commission under section 1671d or 1673d of this title.

(ii) A final negative determination by the Secretary, the administering authority, or the Commission under section 1303, 1671d, or 1673d of this title.

(iii) A determination, other than a determination reviewable under paragraph (1), by the Secretary, the administering authority, or the Commission under section 1675 of this title.

(iv) A determination by the administering authority, under section 1671c or 1673c of this title, to suspend an antidumping duty or a countervailing duty investigation.

(v) An injurious effect determination by the Commission under section 1671c(h) or 1673c(h) of this title.

(3) Procedures and fees

The procedures and fees set forth in chapter 169 of title 28 apply to an action under this section.

(b) Standards of review

(1) Remedy

The court shall hold unlawful any determination, finding, or conclusion found—

(A) in an action brought under paragraph (1) of subsection (a) of this section, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or

(B) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

(2) Record for review

(A) In general

For the purposes of this subsection, the record, unless otherwise stipulated by the parties, shall consist of—

(i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

(B) Confidential or privileged material

The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

(c) Liquidation of entries

(1) Liquidation in accordance with determination

Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the

administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Customs and Patent Appeals, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

(2) Injunctive relief

In the case of a determination described in paragraph (2) of subsection (a) of this section by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

(3) Remand for final disposition

If the final disposition of an action brought under this section is not in harmony with the published determination of the Secretary, the administering authority, or the Commission, the matter shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court.

(d) Standing

Any interested party who was a party to the proceeding under section 1303 of this title or subtitle IV of this chapter shall have the right to appear and be heard as a party in interest before the United States Court of International Trade. The party filing the action shall notify all such interested parties of the filing of an action under this section, in the form, manner, style, and within the time prescribed by rules of the court.

(e) Liquidation in accordance with final decision

If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Customs and Patent Appeals—

(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,

shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

(f) Definitions

For purposes of this section—

(1) Administering authority

The term "administering authority" means the administering authority described in section 1677(1) of this title.

(2) Commission

The term "Commission" means the United States International Trade Commission.

(3) Interested party

The term "interested party" means any person described in section 1677(9) of this title.

(4) Secretary

The term "Secretary" means the Secretary of the Treasury.

Section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. § 1675(a)):

Periodic review of amount of duty

(1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of

this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net subsidy or margin of sales at less than fair value involved in the agreement,

and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

(2) Determination of antidumping duties

For the purpose of paragraph (1)(B), the administering authority shall determine—

(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

Section 751(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1675(d)):

Hearings

Whenever the administering authority or the Commission conducts a review under this section it shall, upon the request of any interested party, hold a hearing in accordance with section 1677c(b) of this title in connection with that review.

Section 771(9) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677(9)):

Interested party.—The term "interested party" means—

(A) a foreign manufacturer, producer, or exporter, or the United States importer, of merchandise which is the subject of an investigation under this subtitle or a trade or business association a majority of the members of which are importers of such merchandise,

(B) the government of a country in which such merchandise is produced or manufactured,

(C) a manufacturer, producer, or wholesaler in the United States of a like product,

(D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product, and

(E) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States.

Section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617):

Compromise of government claims by Secretary of Treasury

Upon a report by a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery

and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

Section 106(a) of the Trade Agreements Act of 1979 (Pub. L. No. 96-39, 93 Stat. 144, 193 (1979)):

REPEAL OF OLD LAW.—The Antidumping Act, 1921 (19 U.S.C. 160 et seq.) is hereby repealed but findings in effect on the effective date of this Act, or issued pursuant to court order in an action brought before that date, shall remain in effect, subject to review under section 751 of the Tariff Act of 1930.

Section 1002(b)(3) of the Trade Agreements Act of 1979 (Pub. L. No. 96-39, 93 Stat. 144, 307 (1979)):

CERTAIN COUNTERVAILING AND ANTIDUMPING DUTY ASSESSMENTS.—The amendments made by this title shall apply with respect to the review of the assessment of, or failure to assess, any countervailing duty or antidumping duty on entries subject to a countervailing duty order or antidumping finding if the assessment is made after the effective date. If no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, made by the Secretary of the Treasury or the International Trade Commission before the effective date, on which such order, finding, or lack thereof is based, then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date.

28 U.S.C. § 1541(a):

The Court of Customs and Patent Appeals shall have exclusive jurisdiction of appeals from all final decisions of the Court of International Trade.

28 U.S.C. § 1581:

Civil actions against the United States and agencies and officers thereof

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to con-

test the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930; and

(2) any order of the Secretary of the Treasury to revoke or suspend a customhouse broker's license under section 641(b) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

28 U.S.C. § 2631:

Persons entitled to commence a civil action

(a) A civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930

may be commenced in the Court of International Trade by the person who filed the protest pursuant to section 514 of such Act, or by a surety on the transaction which is the subject of the protest.

(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed such petition.

(c) A civil action contesting a determination listed in section 516A of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose.

(d)(1) A civil action to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act may be commenced in the Court of International Trade by a worker, group of workers, certified or recognized union, or authorized representative of such worker or group that applies for assistance under such Act and is aggrieved by such final determination.

(2) A civil action to review any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act may be commenced in the Court of International Trade by a firm or its representative that applies for assistance under such Act and is aggrieved by such final determination, or by any other interested domestic party that is aggrieved by such final determination.

(3) A civil action to review any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act may be commenced in the Court of International Trade by a community that applies for assistance under such Act and is aggrieved by such final determination, or by any other interested domestic party that is aggrieved by such final determination.

(e) A civil action to review a final determination made under section 305(b)(1) of the Trade Agreements Act of

1979 may be commenced in the Court of International Trade by any person who was a party-at-interest with respect to such determination.

(f) A civil action involving an application for the issuance of an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party whose application for disclosure of such confidential information was denied under section 777(c)(1) of such Act.

(g)(1) A civil action to review any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person whose license was denied or revoked.

(2) A civil action to review any order of the Secretary of the Treasury to revoke or suspend a customhouse broker's license under section 641(b) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person whose license was revoked or suspended.

(h) A civil action described in section 1581(h) of this title may be commenced in the Court of International Trade by the person who would have standing to bring a civil action under section 1581(a) of this title if he imported the goods involved and filed a protest which was denied, in whole or part, under section 515 of the Tariff Act of 1930.

(i) Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)-(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5.

(j)(1) Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that—

(A) no person may intervene in a civil action under section 515 or 516 of the Tariff Act of 1930;

(B) in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right; and

(C) in a civil action under section 777(c)(2) of the Tariff Act of 1930, only a person who was a party to the investigation may intervene, and such person may intervene as a matter of right.

(2) In those civil actions in which intervention is by leave of court, the Court of International Trade shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(k) In this section—

(1) "interested party" has the meaning given such term in section 771(9) of the Tariff Act of 1930; and

(2) "party-at-interest" means—

(A) a foreign manufacturer, producer, or exporter, or a United States importer, of merchandise which is the subject of a final determination under section 305(b)(1) of the Trade Agreements Act of 1979;

(B) a manufacturer, producer, or wholesaler in the United States of a like product;

(C) United States members of a labor organization or other association of workers whose members are employed in the manufacture, production, or wholesale in the United States of a like product; and

(D) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States.

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: HON. HERBERT N. MALETZ, JUDGE

Civil Action No. 80-5-00861
Complaint File

ZENITH RADIO CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

First Amended Complaint

Plaintiff, Zenith Radio Corporation, by and through its counsel, alleges herein as follows:

1. This action is brought pursuant to section 516A(a)(2) of the Tariff Act of 1930 (19 U.S.C. §1516a(a)(2)). This Court has jurisdiction by reason of 28 U.S.C. § 1581(c).

2. Alternatively, this action is brought pursuant to 5 U.S.C. § 772 [*sic*] *et seq.*, and is within this Court's subject matter jurisdiction by reason of 28 U.S.C. §1581(i).

3. Plaintiff is a manufacturer in the United States of television receivers.

4. On March 10, 1971, the Secretary of the Treasury caused to be published a finding of dumping with respect to television receivers from Japan (T.D. 71-76), which finding was issued and published pursuant to the Antidumping Act of 1921, as amended (19 U.S.C. § 160 *et seq.*).

5. Between the date of publication of T.D. 71-76 and March of 1972, the Bureau of Customs (now Customs Service) assessed, in the liquidation of entries of television receivers from Japan, approximately $1 million in antidumping duties.

6. No importation of television receivers from Japan entered subsequent to March 1972 was liquidated until March 31, 1978.

7. During the six year period between March 1972 and March 1978, the Customs Service had made repeated requests of manufacturers, exporters, and importers of television receivers from Japan for information which the Customs Service needed in order to ascertain the amounts of antidumping duties to be assessed on entries of television receivers from Japan. Specifically, the requested information was needed to enable the Customs Service to ascertain (a) the foreign market value (19 U.S.C. § 164) or constructed value (19 U.S.C. § 165) of television receivers from Japan covered by each entry, (b) the purchase price (19 U.S.C. § 162) or exporter's sales price (19 U.S.C. § 163) of said television receivers, and (c) the adjustments, if any, which would be made to the aforesaid foreign market value (19 U.S.C. § 161(b) and (c)). The Customs Service found that the manufacturers and exporters of television receivers from Japan either refused to submit, or to afford the Customs Service access to, requested information or were extremely tardy in submitting information, and, additionally, the information which was submitted was found to be inaccurate, incomplete, unreliable, and/or false.

8. Beginning in December 1976, the Customs Service learned that much information submitted to it by many of the importers of television receivers from Japan was false or fraudulent, designed to overstate the actual purchase price in order to reduce the antidumping duty liability. A massive investigation conducted by the Office of Investigations of the Customs Service revealed that importers, manufacturers, and exporters of television receivers from Japan engaged in rebate schemes as well as other practices directed to the masking of potential antidumping duties.

9. Under the Commodity Tax Law of Japan, a tax is levied on all television receivers produced for sale in Japan and is based on the freely offered selling price of the product for sales

to all purchasers in the ordinary wholesale quantities and in the ordinary course of wholesale trade. By late 1977, the Customs Service concluded that information submitted to the Customs Service by the manufacturers of television receivers from Japan could not be relied upon to establish foreign market value (19 U.S.C. § 164) or their claimed adjustments (19 U.S.C. § 161(b) and (c)). The Customs Service determined, with the approval of the Treasury Department, that the foreign market value could be accurately and properly ascertained by using information derived from Japanese Commodity Tax reports supplied by the Japanese manufacturers to the Japanese Government. This determination was based upon the following considerations: (a) by statute, Congress had instructed and authorized Customs Service officers to use all reasonable ways and means to ascertain, estimate and appraise the foreign market value, and any other fact deemed necessary for the purposes of the Antidumping Act; (b) the manufacturers of television receivers from Japan had consistently failed to furnish the Customs Service with requested information or else had provided the Customs Service with information that was incomplete, inaccurate, false, and/or unverifiable; (c) the long delay in the assessment of antidumping duties represented a perversion of the intent of the Antidumping Act and a negation of the remedial protection intended by Congress for the affected United States industry; (d) the statutory basis for the assessment of the Commodity Tax in Japan is virtually identical to the statutory definition of foreign market value in the Antidumping Act; and (e) the statements of the Japanese television receiver manufacturers submitted to the Japanese Government for the purpose of assessing the Commodity Tax constitute admissions of said manufacturers as to the foreign market value of the television receivers.

10. In late 1977 and early 1978, a special task force of customs officers proceeded to determine the amount of antidumping duties owing on unliquidated television receivers from Japan, entered, or withdrawn from warehouse, for consumption through March 1977. In making these calculations,

foreign market value was based on the Commodity Tax Law reports, hardly any adjustments were allowed, and purchase price was based on information contained in actual invoices, even though by that time the Customs Service had become aware that double invoicing and rebating were widespread and that the prices shown on the invoices were frequently overstated. It was determined that approximately $382 million in antidumping duties would be assessed in the liquidation of the aforesaid entries. Bulletin notices of liquidation for these entries were prepared, were dated March 31, 1978, and were to be posted on March 31, 1978, at customhouses throughout the United States.

11. On March 28, 1978, the General Counsel of the Treasury Department met with the First Secretary of the Embassy of Japan and numerous attorneys for Japanese television manufacturers. On March 30, 1978, Customs Headquarters issued telex instructions to all regional commissioners, all district directors, and all area directors, instructing that all entries of television receivers from Japan entered subsequent to June of 1973 be deleted from the bulletin notices of liquidation that were to be posted on March 31, 1978. The deletions were made by hand by Customs Service field personnel before the bulletin notices were posted. On March 31, 1978, the amended bulletin notices of liquidation were posted, entries of television receivers from Japan entered on or before June 30, 1973 were liquidated, and approximately $46 million in antidumping duties were assessed thereon. With respect to these liquidated duties, normal collection efforts were not pursued by the Customs Service.

12. With respect to false statements appearing on invoices, designed to overstate the purchase price of television receivers from Japan, the Customs Service determined that the matter could be satisfactorily addressed under section 592 of the Tariff Act of 1930 (19 U.S.C. § 1592) and under various criminal statutes. Thus, the Customs Service continued to conduct section 592 investigations and, also, in March 1978, turned over to the Criminal Division of the Department of Justice

evidence with respect to undisclosed kickbacks and rebates, that it had accumulated, to support possible prosecutions of fraud. Subsequently, several grand juries conducted investigations into these matters. Thus far, one multicount indictment has been returned against a major importer of television receivers from Japan and, further, another importer of television receivers from Japan has pleaded guilty to a Customs fraud charge.

13. In December 1978, television receivers of three Japanese manufacturers which were entered between July 1, 1973 and December 31, 1974 were liquidated. In June 1979, a relatively small number of entries of television receivers from Japan was also liquidated. The total antidumping duties assessed in the liquidations of December 1978 and June 1979 was approximately $32 million. Upon information and belief, certain entries of television receivers from Japan manufactured by Sony Corporation of Japan were liquidated in December 1979 resulting in the assessment of less than $500,000 in antidumping duties. Other than those entries liquidated in December 1978, June 1979, and in December 1979, no entries of television receivers from Japan entered subsequent to June 30, 1973 have been liquidated. Most all of the liquidations of March 1978, December 1978, and June 1979 were protested by the importers. Protest decisions were issued by the Customs Service in late 1979 and early 1980, denying in part and allowing in part the protest claims against the liquidations of March 1978. In the protest decisions, the Customs Service upheld the use of the Commodity Tax approach in ascertaining foreign market value but it allowed many of the Japanese manufacturers' claimed adjustments, thereby reducing the amounts of antidumping duties owed.

14. Effective January 1, 1980, the determination of antidumping duties on entries of merchandise subject to a finding of dumping and not assessed with antidumping duties as of that date became governed by the procedure specified in section 751 of the Tariff Act of 1930 (19 U.S.C. § 1675), which was added by the Trade Agreements Act of 1979. Among other

things, section 751 provides interested parties with the opportunity and the right to participate in the proceeding for determining the amount of antidumping duties to be assessed. Further, section 516A(a)(2)(B)(iii) of the Tariff Act of 1930 (19 U.S.C. § 1516a(a)(2)(B)(iii)), added by the Trade Agreements Act of 1979 and also effective on January 1, 1980, provides interested parties with the opportunity and the right to obtain judicial review of administrative determinations reached under section 751.

15. Effective January 2, 1980, the responsibility for administering the antidumping law and for acting as the "administrative authority" under section 751 and other sections of the Tariff Act of 1930 was transferred to the Secretary of Commerce (Exec. Order 12188).

16. On March 28, 1980, the Department of Commerce caused to be published a notice in the Federal Register (45 Fed. Reg. 20511), pursuant to section 751(a)(1) of the Tariff Act of 1930, in which it stated that it was "conducting an administrative review of findings of dumping under the Antidumping Act, 1921, to determine the foreign market value and United States price of each entry of merchandise subject to the finding . . . and to determine the amount, if any, by which the foreign market value exceeds the United States price." The dumping finding of television receivers from Japan was listed specifically among those findings for which the administrative review would be conducted. The notice also stated: "After providing an opportunity for comment by interested parties, the Department of Commerce will publish in the Federal Register the results of such review, together with notice of any antidumping duties to be assessed and estimated antidumping duties to be deposited."

17. On April 28, 1980, Homer E. Moyer, Jr., General Counsel of the Commerce Department, conducted a press conference at the Commerce Department. That conference was attended by plaintiff's counsel, among other persons. At the conference, Mr. Moyer advised that the Commerce and

Treasury Departments had on that date concluded agreements to settle claims for antidumping duties and penalties related to the importation of television receivers from Japan during the period 1971 to 1979. Mr. Moyer cited 19 U.S.C. § 1617 as the legal authority for the settlement. He indicated that agreements had been reached with 22 importers and that these importers accounted for the great bulk of imported television receivers subject to the finding, T.D. 71-76. Distributed at the conference were (a) a press release dated April 28, 1980, (b) a prototype settlement agreement, and (c) a list of the informal names of companies with whom agreements had been reached. Copies of these documents as well as a copy of the transcript of the press conference are annexed hereto as Collective Exhibit 1 and made a part hereof. Included in the settlement were (a) claims by the United States arising out of liquidations—some of which claims were asserted in several collection suits in United States District Courts, (b) claims by an importer of television receivers from Japan in an action in this Court challenging the assessment of antidumping duties on two entries, (c) alleged claims by the United States for penalties arising out of an investigation relating to section 592 of the Tariff Act of 1930, and (d) alleged claims by the United States arising out of unliquidated entries of television receivers from Japan, entered between July 1, 1973 and March 31, 1979.

18. At the press conference of April 28, 1980, Mr. Moyer indicated that the Commerce Department had determined that the total amount of antidumping duties on the subject entries of television receivers from Japan was approximately $138.7 million. Included in this amount was an amount found to be due on the previously liquidated and protested entries, which amount, upon information and belief, was approximately $13 million.

19. Under the terms of the settlement, a total of between $75 and $77 million would be paid by the importers. Approximately $66 million represented antidumping duties and approximately $9 to $11 million represented penalties under 19 U.S.C. § 1592. In return for these payments (or agreements to

make these payments) the responsible agencies of the United States would: (a) dismiss with prejudice the suits for the collection of duties; (b) abandon certain further administrative investigations concerning the possible imposition of civil penalties pursuant to 19 U.S.C. § 1592; and (c) within ten days, issue instructions to Customs officers to liquidate entries made prior to March 31, 1979 without assessing any antidumping duties. The settlement agreements also contained false statements, including the following: "The United States knows of no violation or potential violation of law relating to or arising from the importation, sale or exportation of television receivers by the . . . [importer] or the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase . . . ."

20. Neither plaintiff nor any of its representatives was aware of the settlement or settlement agreements, or of any of the substantive determinations reflected therein, until the announcement was made thereof at the aforedescribed press conference.

21. On May 9, 1980, the United States Court of Appeals for the District of Columbia Circuit, in the case of *The Committee to Preserve American Color Television (a.k.a. COMPACT) et ano* v. *Miller, et al.*, Appeal No. 79-1948, issued, *per curiam*, an injunction pending appeal, pursuant to the appellants' motion, thereby enjoining the Customs Service from liquidating entries of television receivers subject to T.D. 71-76 or from implementing the terms of any of the settlement agreements pending the subject appeal. That appeal arose out of an action brought in the United States District Court for the District of Columbia to challenge the protracted refusal of officials of the Treasury Department and Customs Service to enforce T.D. 71-76 as required by law through the assessment and collection of antidumping duties. The District Court dismissed the action for lack of subject matter jurisdiction and the plaintiffs therein filed an appeal to challenge that jurisdictional ruling. After the Court of Appeals issued the injunction pending appeal, the appellees filed a motion to dissolve the injunction, which motion was denied *per curiam*, in an order entered on May 27,

1980. Thereafter, the appellees filed a motion to expedite the appeal, and the appellants filed a motion for leave to file a supplemental brief. On June 17, 1980, the Court of Appeals, *per curiam*, denied the motion to expedite and ordered the parties to file supplemental briefs.

22. In reaching or prior to reaching the settlement agreements, discussed above, the Commerce Department did the following: (a) it determined the foreign market value, including adjustments to foreign market value, and the United States price (*i.e.*, purchase price or exporter's sales price) for all unliquidated entries of television receivers from Japan, entered prior to April 1, 1979; (b) it determined that the amount of antidumping duties due on said unliquidated entries was approximately $138.7 million (less the relatively small amount found due on previously liquidated and protested entries); (c) it determined that it would demand, as antidumping duties for the said unliquidated entries, approximately $66 million (less the relatively small amount found due on previously liquidated and protested entries); and (d) it determined that no antidumping duties would be assessed in the individual liquidations of the aforesaid unliquidated entries. Thus, the Commerce Department has made determinations described in section 751 of the Tariff Act of 1930, although, in failing to give plaintiff or other interested parties representing the domestic television industry an opportunity to be heard prior to making such determinations, it has not followed the procedures mandated by that section or other provisions of law and it has not followed the procedures which it appeared to indicate it would follow in the Federal Register notice of March 28, 1980 (*see* ¶ 16, *supra*). Moreover, the Commerce Department had made its determination as to the amount of antidumping duties due (*see* (b) above) well in advance of the settlement of April 28, 1980. Instead of publishing that determination in accordance with section 751, which would have enabled the plaintiff to contest the determination promptly in this Court, the Commerce Department engaged in secret negotiations with representatives of manufacturers, exporters, and importers of television re-

ceivers from Japan, which negotiations culminated in the aforedescribed settlement.

23. Plaintiff contests the aforedescribed settlement and further contests the following: (a) the Commerce Department's determination that the amount of antidumping duties due on unliquidated entries of television receivers from Japan, entered prior to April 1, 1979, was only approximately $138.7 million (less the relatively small amount found due on previously liquidated and protested entries); (b) the Commerce Department's determination to demand only approximately $66 million (less the relatively small amount found due on previously liquidated and protested entries) as antidumping duties for the aforedescribed unliquidated entries, (c) the Commerce Department's determination not to assess any antidumping duties in the individual liquidations of the aforedescribed entries, and (d) the Commerce Department's failure to follow the mandatory procedures set forth in section 751 of the Tariff Act of 1930. Plaintiff believes that the total amount of antidumping duties which should be assessed on the aforesaid unliquidated entries is in the vicinity of $600 million and that the Commerce Department's determination to reduce the amount of antidumping duties to $138.7 million, as described in (a) above, is without any substantial evidence to support it, is arbitrary, is without any rational basis in fact, and is unlawful.

24. Plaintiff has participated in the antidumping proceeding involving television receivers from Japan, by having submitted relevant and substantial information to the Treasury Department (including Customs Service) and Tariff Commission (now International Trade Commission) before the issuance of the finding (T.D. 71-76) as well as having submitted relevant and substantial information to the Treasury Department (including Customs Service) subsequent thereto.

25. On May 27, 1980, within 30 days after having received actual notice of the settlement agreements, plaintiff initiated this action under and in accordance with § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, by the filing of a summons. The original

complaint was also filed under and in accordance with § 516A(a)(2)(B)(iii), within 30 days after the filing of the aforesaid summons.

26. Plaintiff stands to be adversely affected or aggrieved by the subject settlement agreements. These agreements have resulted in the denial to plaintiff of procedural and substantive rights which Congress intended for it to have under section 751 of the Tariff Act of 1930. If it is concluded that the settlement agreements do not contain determinations described by section 751, *supra*, then the agreements will have deprived plaintiff of yet an additional congressionally-bestowed right, namely, the right to judicial review pursuant to section 516A of the Tariff Act of 1930. Further, if the settlement agreements are implemented they will result in the unlawful release from antidumping duty liability to plaintiff's competitors of hundreds of millions of dollars.

FIRST CAUSE OF ACTION

27. The allegations of ¶¶ 1 through 26 are hereby incorporated by reference as though set forth at length.

28. The settlement of alleged claims related to the importation of television receivers from Japan is *ultra vires*, illegal, and void.

29. Section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617) does not provide any authority for the settlement of the alleged claims related to the importation of television receivers from Japan, for the avoidance of the procedures specified by Congress in section 751 of the Tariff Act of 1930, relating to the determination and assessment of antidumping duties on entries subject to findings of dumping, and for the avoidance of the assessment of antidumping duties in accordance with the statutory command of the antidumping provisions of the law.

30. The subject settlement constitutes an unlawful attempt by officials of the United States Government (a) to deprive the plaintiff of the opportunity to be heard before

substantive determinations involving the amounts of antidumping duties to be assessed on merchandise subject to an existent dumping finding were made, (b) to deprive the plaintiff of the right of judicial review over such determinations, and (c) to oust this Court of jurisdiction to review such determinations, which opportunity to be heard, which right to judicial review, and which jurisdiction were clearly conferred by Congress in the Trade Agreements Act of 1979.

SECOND AND ALTERNATIVE CAUSE OF ACTION

31. The allegations of ¶¶ 1 through 26 are hereby incorporated by reference as though set forth at length.

32. Assuming that section 617 of the Tariff Act of 1930 provided the authority to settle the alleged claims related to the importation of television receivers from Japan (which authority plaintiff denies), the United States Government officials who recommended and who determined that the alleged claims should be settled acted arbitrarily, capriciously, in bad faith, and unlawfully. Accordingly, the settlement is illegal and void and the failure of the Commerce Department to follow the procedures specified in section 751 of the Tariff Act of 1930 and to make proper determinations and assessments of antidumping duties on entries of television receivers from Japan is likewise illegal.

33. The Secretary of Commerce, in approving the recommendation for settlement, and the United States Government officials who recommended settlement, did not take into account those factors which Congress deemed relevant to any settlement of claims authorized by section 617 of the Tariff Act of 1930. Moreover, neither the Secretary of Commerce in deciding to settle the alleged claims nor those Government officials who had the statutory responsibility to recommend settlement exercised the independent judgment contemplated by Congress, in enacting section 617.

34. The recommendations and the decision to settle the alleged claims as well as the terms of the settlement were based on the bad faith and improper motivations of persons in

the Executive Branch, including the Executive Office of the President, the Commerce Department, the Treasury Department, and other agencies. The recommendations and decision to settle, and terms of the settlement, were based primarily on political and other irrelevant considerations in defiance of the mandatory provisions of the governing statutory law.

35. The Commerce Department's representation that the maximum antidumping duty liability for television receivers from Japan was only approximately $138.7 million was arbitrary and made in bad faith. First, that determination was known by the Commerce Department and officials in other Government agencies to have been based upon falsely inflated purchase price information, concealing true margins of dumping. Second, the $138.7 million amount reflects arbitrary allowances based upon Japanese manufacturers' unjustified claims for adjustments to foreign market value. The granting of these claims for adjustments resulted in the reduction of antidumping duties by hundreds of millions of dollars. The granting of these claims was made notwithstanding the following: (a) the Customs Service had made numerous efforts to verify said claims (including numerous visits by Customs Service attorneys and auditors to the facilities of the television receiver manufacturers in Japan) and had repeatedly rejected the claims as being unreliable and unsubstantiated; (b) numerous Customs Service attorneys and auditors had recommended against the allowance of said claims; (c) private auditors retained by the Government for the purpose of giving advice with respect to the adjustment claims of a leading Japanese television manufacturer had recommended to the Customs Service that the claims were not supported by the available data; and (d) numerous Customs Service attorneys had correctly recommended against the allowance of some of the claims as a matter of law.

36. The suggestion made by officials in the Commerce Department that the Commodity Tax approach to determining foreign market value is somehow unsound or vulnerable is false and was made in bad faith. The Commodity Tax approach to

determining foreign market value of television receivers from Japan is sound and lawful and had been, over an extended period of time, carefully studied, analyzed, and approved by numerous attorneys and responsible officials in the Customs Service and Treasury Department.

37. The subject settlement represents the culmination of many years of utter disregard for the law by officials of the Executive Branch. The administration and enforcement of the Antidumping Act with respect to television receivers from Japan has consistently been frustrated and subject to extreme political pressures. In May 1977 when the United States entered into a publicized agreement with Japan (Orderly Marketing Agreement) to limit the number of color television receivers exported from Japan to the United States, the two governments also entered into a secret side agreement in which the President's Special Representative for Trade Negotiations agreed on behalf of the United States that the Treasury Department would assess antidumping duties "in strict conformity with the international Antidumping Code," notwithstanding that the Code differed from the Antidumping Act in several respects, including, but not limited to, the authorization in the Code to calculate antidumping duties in an amount less than the actual dumping margin. Subsequently, in carrying out their responsibilities in connection with the administration of the Antidumping Act with respect to television receivers from Japan, Customs Service attorneys and other personnel have been interfered with and pressured by United States Government officials to reach decisions contrary to law and fact and hospitable to the interests of the manufacturers, exporters, and importers of television receivers from Japan, and to the Government of Japan. Assignments and reassignments of Customs Service attorneys and other personnel have been made in order to accommodate the interests of the manufacturers, exporters, and importers of television receivers from Japan and the Government of Japan. United States Government officials, for over at least a year and a half, have been negotiating with officials of the Government of Japan and

with representatives of manufacturers, exporters, and importers of television receivers from Japan with the objective of reaching a settlement of alleged claims arising in connection with the importation of television receivers from Japan. Finally, United States Government officials included, in the settlement agreements signed on April 28, 1980, language known by them to be false (*see, e.g.*, ¶ 19, *supra*), which language was designed to give aid and comfort to those manufacturers and importers of television receivers from Japan who are defendants in a major civil antitrust suit, and which language has in fact been relied upon by the attorneys for said manufacturers and importers in a recent court proceeding in that suit. In sum, the subject settlement has been incurably tainted by an alarming history of political interference, bad faith, and lawlessness on the part of those United States Government officials entrusted with the administration and enforcement of the applicable law.

PRAYER FOR RELIEF

WHEREFORE, it is respectfully prayed that this Honorable Court (1) determine that the settlement of alleged claims for antidumping duties related to the importation of television receivers from Japan is illegal and void; (2) direct that the settlement be set aside and that the liquidation of entries pursuant to the settlement be permanently enjoined; and (3)

provide any other relief which this Honorable Court deems just and proper.

Respectfully submitted,

/s/ Frederick L. Ikenson
FREDERICK L. IKENSON
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Washington, D.C. 20009
Telephone: (202) 483-8900

/s/ Philip J. Curtis
PHILIP J. CURTIS
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Glenview, Illinois 60025
Telephone: (312) 391-8110
Attorneys for Plaintiff

Dated: November 3, 1980

VERIFICATION

I declare under penalty of perjury that the allegations in the foregoing First Amended Complaint are true and correct according to the best of my knowledge, information, and belief.

/s/ Frederick L. Ikenson
FREDERICK L. IKENSON

I declare under penalty of perjury that the allegations in the foregoing First Amended Complaint are true and correct according to the best of my knowledge, information, and belief.

/s/ Philip J. Curtis
PHILIP J. CURTIS

Collective Exhibit 1

UNITED STATES DEPARTMENT OF
COMMERCE NEWS
WASHINGTON, D.C. 20230

Office of the Secretary

CONTACT: Dan Landa (202) 377-2253 G 80-79

For Release Monday, April 28, 1980

Commerce Department Reaches Agreement On TV Import Cases

The Secretary of Commerce today announced that the Commerce Department and Treasury Department have reached agreement with all the major importers covering outstanding claims on television receivers imported from Japan prior to April 1, 1979. Under the terms of the agreements, the Commerce Department has agreed to drop claims for dumping duties. The Treasury Department has agreed that it will cease penalty investigations in preparation and not bring any formal charges.

If all importers agree to settlement, the Commerce and Treasury Departments will receive in excess of $75 million. Agreements already executed include settlement amounts in excess of $70 million. The Commerce and Treasury Departments accept these payments as settlement of Government claims; the companies pay the amounts in settlement but do not admit that dumping duties or penalties are owed.

As a part of these settlements, the Justice Department has agreed to terminate actions for collection of unpaid duty assessments, which were filed last year.

The agreements provide that the Commerce Department will insure that all future assessments of antidumping duties on television receivers are conducted on a timely basis, and that the importers will cooperate with the Commerce Department in submitting data and making information available for verification. With this cooperation, future reviews will be based upon the traditional procedures prescribed in the Trade Agreements Act, and not the Commodity Tax approach that was adopted by the Treasury Department in 1978 and 1979.

The Commerce Department will now transfer resources committed to the assessment backlog in the television dumping proceeding to the preparation of prompt future liquidations within the terms of the 1979 Trade Agreements Act.

AGREEMENT

THIS AGREEMENT is made this ____ day of April, 1980, by and between _____, a corporation organized under the laws of the State of _____ (hereinafter referred to as the "Company"), and the United States Department of Commerce, the United States Treasury Department, the United States Customs Service, and the United States Department of Justice (the aforesaid hereinafter referred to individually and collectively as the "United States").

WITNESSETH

WHEREAS, the United States has assessed certain duties pursuant to T.D. 71-76 for the importation of television receivers from Japan and has claims for additional duties under T.D. 71-76 for the period through March 31, 1979;

WHEREAS, the United States has reviewed such assessments and claims, the facts upon which they are based, and the probabilities of collection or recovery;

WHEREAS, the Company disputes the validity of such assessed duties and other claims;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and promises contained herein and other good and sufficient consideration, the receipt and adequacy of which being hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

1. This Agreement is for settlement purposes only, and is not intended to constitute and shall not be construed as an admission that the Company is to any extent liable for antidumping duties on its importations of television receivers subject to T.D. 71-76. Payments hereunder do not constitute, nor shall they be construed as, forfeitures, fines or penalties (or payments in lieu thereof), and nothing herein is intended as or shall be construed as an admission by the Company, its subsidiaries, affiliates, parents, officers, directors, employees, representatives, agents, successors and assigns, or any of them, of any violation of law. The subject matter of this agree-

ment, insofar as it pertains to any matter within the jurisdiction of the United States Treasury Department, relates solely to matters arising under the Customs laws of the United States and is not meant to be reflective of the Department's views or bind the Department with respect to any other law.

2. The Company will pay to the United States the sum of $____, which shall be paid as follows:

A. $25%, by check payable to the United States within thirty (30) days after the United States District Court(s) has (have) entered order(s) dismissing, with prejudice, the complaint(s) referred to in paragraph 3 below;

B. $75%, by check payable to the United States within one hundred and eighty days (180) after the United States District Court(s) has (have) entered order(s) dismissing, with prejudice, the complaint(s) referred to in paragraph 3 below;

Beginning on the sixteenth (16th) day after the date the agreement is signed, interest shall be payable on any unpaid amounts at the rate in effect under section 6621 of the Internal Revenue Code of 1954.

The Company shall have the right to prepay, in whole or in part, any amount due hereunder, without any penalty, charge or assessment.

3. Promptly upon the execution of this Agreement, the United States shall cause to be dismissed, with prejudice, its complaint(s) or amended complaint(s) in civil actions pending in the United States District Court(s) against the Company, its sureties and brokers with respect to entries of television receivers prior to April 1, 1979, and, to this end, shall execute and deliver to the Company the stipulation(s) in the form annexed hereto.

4. With respect to entries of television receivers by the Company prior to April 1, 1979:

(a) The United States shall liquidate promptly at invoice unit values entries of said television receivers which have not yet been liquidated;

(b) The United States shall reliquidate promptly at invoice unit values liquidations of entries of said television receivers which are not final and conclusive due to the timely filing of protests with respect to such liquidations;

(c) The United States shall re-reliquidate promptly at invoice unit values reliquidations of entries of said television receivers to the extent such reliquidations have not become final and conclusive;

(d) Within 10 days of the date of this Agreement, the United States Customs Service shall issue instructions to begin prompt liquidation of all entries of television receivers subject to this Agreement in accordance with subparagraphs (a), (b), and (c) of this paragraph;

(e) The Company waives any further procedural or administrative steps, except those specified herein;

(f) The Company waives any requirement that any decision of the United States contain a statement of findings of fact and conclusions of law;

(g) The Company waives all rights to seek administrative or judicial review or otherwise challenge or contest the validity of this Agreement or the liquidations, reliquidations, or re-reliquidations, except for clerical error or mistake of fact pursuant to section 520(c) of the Tariff Act of 1930 (19 U.S.C. 1520(c));

(h) The Company shall cooperate in supplying any documents or information necessary to the completion of liquidations under this paragraph; and

(i) The United States knows of no violation or potential violation of law relating to or arising from the importation, sale or exportation of television receivers by the Company or the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase; and the United States shall cease any pending investigation relating to television receivers manufactured in Japan and which the Company entered prior to April 1, 1979.

5. The United States hereby releases, waives, remises and discharges in full (a) all claims for antidumping duties on all

entries of television receivers liquidated or to be liquidated subsequent to March 30, 1978, which are subject to T.D. 71-76 on which the Company made entry prior to April 1, 1979, and (b) all claims, if any, arising under section 592 of the Tariff Act of 1930 (19 U.S.C. 1592), of which it presently knows or, under existing procedures for examining documents or analyzing information, should have known, with respect to entries of television receivers made prior to April 1, 1979.

6. With respect to the appraisement and liquidation of entries of television receivers from Japan subsequent to March 31, 1979 under T.D. 71-76, the parties agree:

(a) That the payment by the Company pursuant to this Agreement shall not be deemed an expense required to be included in any calculation of expenses for such appraisement and liquidation, and such payment shall otherwise be disregarded in making the calculations and assessments of duties, charges or other exactions imposed upon such imports;

(b) That the United States shall provide the Company and the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase a reasonable opportunity to submit transactional information and data relevant to such appraisements and liquidations;

(c) That the Company shall use its best efforts to supply, on a timely basis, complete and accurate information and data where and as required by the laws of the United States of America and applicable regulations under such laws;

(d) That the Company shall permit representatives of the United States to visit its facilities, and to have reasonable access, at mutually convenient dates during regular business hours, to all relevant records and personnel of the Company relating to the importation and sale of television receivers from Japan;

(e) That the Company shall use its best efforts to cause the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase to supply, on

a timely basis, complete and accurate information and data where and as required by the laws of the United States of America and applicable regulations under such laws;

(f) That the Company shall use its best efforts to cause the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase to permit representatives of the United States to visit its facilities and to have reasonable access, at mutually convenient dates during regular business hours, to all relevant records and personnel of the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase relating to television receivers manufactured in Japan;

(g) That the Company shall use its best efforts to aid the United States, whenever the United States deems such actions necessary, in locating and obtaining information from persons and organizations that do business with the Company's Japanese manufacturer/exporter;

(h) That the United States shall utilize the traditional methodology in calculating foreign market values, purchase prices and exporter's sales prices based upon information and data supplied by the Company and the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase unless the United States justifiably concludes that the data submitted by the Company and the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase is untimely, materially inaccurate or incomplete. For the purposes of this subparagraph, "traditional methodology" includes the method under which entries under T.D. 71-76 were assessed and liquidated prior to March 31, 1978, as altered by any changes in that method reflective of applicable amendments to the Antidumping Act, or the regulations and practices thereunder;

(i) That the United States shall use its best efforts to ensure that the appraisement and liquidation of entries shall be made on a timely basis, using complete and reliable information;

(j) That the United States shall promptly revoke or modify T.D. 71-76 as soon as circumstances warrant such revocation or modification in accordance with procedures set forth in the applicable regulations of the Commerce Department;

(k) That the United States acknowledges and agrees that neither the Company nor the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase has, as of the date of the execution of this Agreement, failed to comply with any requests for information or data under T.D. 71-76 by the United States;

(l) That the United States, in administering T.D. 71-76, shall not use any sanction, regulation, ruling, procedure or practice which discriminates against the Company or the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase or against importations of merchandise by the Company into the United States of America; and

(m) That the United States shall make an equitable adjustment in the amount payable by the Company hereunder and, if necessary, refund the amount of such adjustment to the Company, in the event that the United States compromises the amount originally specified of any settlement for claims for duties arising under T.D. 71-76 with any other importer of television receivers from Japan relating to entries prior to April 1, 1979.

7. Representations and Warranties:

(a) The United States represents and warrants that it, its agents and employees, in order to determine whether or not to enter into this Agreement, (i) have had access to, and full opportunity to obtain, review and confirm, any and all information about the Company, its parent or affiliates, and (ii) have conducted a full and complete investigation into all circumstances surrounding importations of television receivers produced in Japan.

(b) Each party to this Agreement represents and warrants that it has the full right, power and authority to execute and deliver this Agreement, and that no approval or authorization by any other person is required for this Agreement to be binding on such party.

8. This Agreement shall be null and void in the event that there be, and upon, a judicial decision final by appeal or, if the time to appeal shall have expired without an appeal having been taken, that the United States did not have the right, power or authority to enter into this Agreement. Within ten (10) calendar days after such decision, the United States shall refund the consideration paid by the Company, pursuant to paragraph 2 above. Nevertheless, if, at the time the agreement be finally declared null and void, the entries of television receivers subject to T.D. 71-76 made prior to April 1, 1979, have been liquidated or reliquidated with no assessment of antidumping duties, and such liquidations or reliquidations have become final or conclusive upon all persons, the applicable consideration paid by the Company shall not be refunded.

9. This Agreement shall be binding upon the Company and shall inure to the benefit of the Company, its respective subsidiaries, affiliates, parents, officers, directors, employees, representatives, agents, successors and assigns, and shall be binding upon, and shall inure to the benefit of the United States.

10. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which, together, shall constitute one and the same instrument.

11. This Agreement represents the entire understanding and agreement between the Company, its subsidiaries, affiliates, parents, officers, directors, employees, representatives, agents and assigns, on the one hand, and the United States, on the other hand, in respect to the subject matter hereof, and supersedes any prior negotiation, letter or understanding relating to the subject matter hereof.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have executed this Agreement on the date first above written.

UNITED STATES DEPARTMENT OF COMMERCE

By: _____

UNITED STATES DEPARTMENT OF TREASURY

By: _____

UNITED STATES CUSTOMS SERVICE

By: _____

UNITED STATES DEPARTMENT OF JUSTICE

By: _____

THE COMPANY

By: _____

Companies With Whom Agreements Have Been Signed

General (Technika)
Hitachi
J.C. Penney
U.S. JVC Corp.
Matsushita
Midlands
Mitsubishi (MELCO)
Mitsubishi International
Montgomery Wards
Nippon Electric
Sears Roebuck & Co.
Sanyo
Sharp
T.G. & Y. Stores, Inc.
Toshiba
Western Auto
White Stores, Inc.

April 28, 1980

THE DEPARTMENT OF COMMERCE

Briefing By

HOMER MOYER, GENERAL COUNSEL,
U.S. DEPARTMENT OF COMMERCE
and
SAL CARAMAGNO, DIRECTOR OF CLASSIFICATION AND VALUE,
U.S. CUSTOMS SERVICE

April 28, 1980

MR. HARTWIG: Good afternoon, ladies and gentlemen. I'm Ron Hartwig, Director of Public Affairs. I'm glad you could all come out to this early morning press conference. We're very sorry about the hour. It was chosen because of the number of people involved.

We have a major announcement to make on a development in the area of the importation of Japanese television receivers. Homer Moyer, who is General Counsel, will give some background and questions can then be addressed to him and Sal Caramagno of the U.S. Customs Service. Homer?

MR. MOYER: The Commerce Department and Treasury Department have today concluded settlements of claims for dumping duties and penalties related to the importation of television receivers from Japan during the period 1971 to 1979.

Settlement amounts will total between $75 and $77 million. Of this amount, $66 million is for dumping duties; that is, against possible dumping duty claims of $138.7 million.

While the dumping finding will remain in effect, the settlement will allow the current system to proceed on a current basis, beginning from April 1, 1979.

What I would like to do—take a few minutes to do is simply walk through with you some of the details of this particular settlement.

This is a long-standing and complex matter and I would like to touch on several different aspects of it, give you a little bit of

the background and then I and Mr. Caramagno from the Customs Service will attempt to answer your questions. There are other representatives here in the audience from the Commerce Department and Customs, the Treasury Department and the Justice Department, all of whom, as you will see, are involved in one respect or another.

First, let me recite for you precisely what is covered by the settlement agreement. First, as I mentioned, settlement of dumping duty claims for the importation of Japanese televisions from 1971 through March 1979. Second, settlement of so-called Section 592 cases—civil cases under the jurisdiction of Customs. Those cases relate to invoicing of [*sic*] practices associated with imports.

Third, the collection suits now being prosecuted by the Justice Department and [*sic*] a number of courts around the country. These collection suits relate to amounts of dumping duties for the early period—the 1971 to 1973 segment of this period—earlier assessed and not yet collected. Those suits will be settled as a result of these agreements.

And fourth, the so-called white stores [*sic*] litigation and lawsuit by an importer challenging the assessment and collection procedures relating to the original dumping duties.

Involved in the settlements potentially, are 110 importing companies. As of this moment, 22 of those companies have executed settlement agreements. These 22 companies account for approximately $70 million of the $75 to $77 million in total settlement amounts.

The 110 companies are all importers. They are both so-called related and unrelated importers. By that I mean related importers are appropriate affiliates of Japanese manufacturers; unrelated companies are U.S. corporations that have no corporate affiliation with Japanese manufacturers.

The settlement of these cases is under the authority of the Secretary of Commerce under Section 1617 of Title IX [*sic*]. That is a provision that confers respectively on the Secretary

of the Treasury and Commerce broad authority to settle and compromise claims arising under the customs law.

The authority of the Secretary of Commerce under this section relates to claims arising under the anti-dumping and counter-billing [*sic*] duty laws.

Let me turn first to the dumping duty settlement. These settlements are result [*sic*] in a large portion of a dispute that dates back some 12 years. Petitions precipitating this inquiry were originally filed in 1968.

This settlement covers claims up through March of 1979. For claims subsequent to March 1979, they will be processed on a current basis under the current law in the manner and employing the methodology traditionally used in any dumping cases.

As many of you know, the responsibility for the anti-dumping program was transferred to Commerce Department from the Treasury Department the 1st of this year.

Since the first of the year, Commerce Department has analyzed the facts of the claims in these cases, the legal theories on which they have been based, and we have produced our own assessment of what the maximum defensable [*sic*]—legally defensable [*sic*] dumping duty claims might be. That figure has been produced in final form within the last several weeks.

That indicates that that figure is $138.7 million—the figure I mentioned at the outset. That is, using our own figures, our best estimate of the maximum claims for dumping duties that this department could make for this time period. That assessment takes into account adjustments that have been made to earlier claims for dumping duties as a result of the so-called protest decision by which initial assessments are issued and made public.

Individual companies file protests, and the government responds to those protests allowing or disallowing individual claims for adjustments.

That assessment also takes into account the so-called high yen period—the period 1977, '78 when the yen was rapidly appreciating—the phenomenon that gave rise to price disparities that may be reflected in dumping.

With respect to the Section 592 cases, Mr. Caramagno will be happy to answer any specific questions you have. These cases involve 10 companies. The settlement agreements already executed involved 4 of those 10 companies. The settlement amount that will be involved for the 592 cases is between $9 and $11 million.

The importance of this settlement and these settlement agreements is several. First, these agreements effectively eliminate a very substantial backlog of unliquidated entries dating back several years which, if left unresolved, would represent and have represented a very substantial burden on the system of import administration—on the administration of the antidumping and counter-bailing [*sic*] duty laws.

Secondly, these agreements resolve this longstanding dispute. They resolve it fairly and on terms that are very fair to the United States.

Third and prospectively, these settlements will allow this department to allocate the resources within the Office of Import Administration to operating that system on a current basis, avoiding problems associated with back claims, assuring that any findings of dumping and duties associated with that would be imposed on a timely and current basis, which will allow timely price adjustments and minimize the kinds of cumulative problems that are represented by these types of cases and the figures that have been associated with it.

With that, I think we should open the floor to questions and Mr. Caramagno and I will be happy to take them.

MR. HARTWIG: Thank you, Homer. We would like to limit questioning please to those of you who are in the media. There will be an opportunity for the others who are in attendance to ask your questions later. First question.

Q. Yes, Compact, you know, put out a statement a week or two ago saying that in fact $700 million of dumping duties were owed. I'd like your comment on that, please.

MR. MOYER: The figures in that range—and the $400 to $700 million range were bandied about a bit beginning a couple of years ago. Those figures were, as I understand it, projections based on the original unadjusted duty assessment, based on the so-called commodity tax approach.

Those assessments and the basis for those projections was a very limited early period of time were [*sic*] subject to the protest decision process which I alluded to. As a result of that process, individual companies came forward and claimed adjustments to which they felt they were entitled under the law. Those claims, 699 in number, were reviewed by the Department and as a result of those, adjustments were allowed or disallowed in individual cases.

As a result of that process was a series of numbers much more realistic in terms of what possible dumping duty claims might be, and much closer to what might be legally sensible. Those figures, as a result of the protest decisions were reduced, I think, in the range of 60 to 90 percent—and original figure of $46 million was, as I recall, reduced to something under $8 million. In a word, the figure you referred to is very much out of date. It is, in my judgment and I think the judgment of most people who have been involved in this case, not remotely legally sensible. And, as I mentioned in my statement, the best figure—the best maximum figure that we have at this time, taking into account all of the information we have, is $138.7 million.

Q. I'm a little confused about that $138.7 million. Is that the figure that you have reached in the settlement or is that what you're saying is the maximum, that the settlement is actually $75 million?

MR. MOYER: The settlement is actually $75 to $77 million. The $138.7 figure is really a point of reference for you—that is

the maximum claim of dumping duties that we feel could be made by the government.

Q. I see. So you actually cut that more or less in half, is that right?

MR. MOYER: More or less. Let me add one more complication and repeat one more wrinkle to that. The $138.7 figure relates solely to dumping duties. $66 million of the $77 relates to dumping, so its $66 against $138.7.

MR. HARTWIG: Over here.

Q. What is the connection between the announcement and the coming trip here, I think, in two days of the Japanese Prime Minister?

MR. MOYER: There's no direct connection in the sense that none of who has been working on this problem has been involved in any way with the upcoming visit of the Prime Minister. Indeed, my involvement in attempting to explore the possibilities of settlements predated my knowing that there was a visit forthcoming.

I think it may have been a factor for some of the companies in terms of the urgency or the timing that they might sense to the Japanese related companies, perhaps. But I think you have to conclude that it's a factor, although it would be a very minor one, quite a few state visits have come and gone since the dumping proceedings were instituted.

Q. Who, in fact, made the decision to expedite this case once it got Commerce and then settle on this particular figure?

MR. MOYER: The process works in the following way. The statutory provision that I mentioned earlier confers on the Secretary the ultimate authority to make such settlements.

It also requires that I, as General Counsel, make a recommendation to him as to the question of settlement. It further requires that I review and take into account reports from the Justice Department, U.S. attorney or a Customs officer assessing the strength of the government's claim, the likely

risk of litigation, the chances of our being able to recover the claims asserted.

That formally and technically is the process. As a practical actual matter, the process to explore the possibility of settlement occurred with the Secretary's concurrence. I would say that I, of the people in the Department with responsibilities relating directly to the Secretary, have been perhaps more involved than anyone else.

And in terms of the figures and the assessments, obviously a great many people have been involved because the figures and the data are voluminous.

Q. There has been a lot of criticism about this case—more publicity than anything that has been generated in some time. And I'm wondering if finally, Secretary Klutznick walked in the door and said get this off our backs and let's move on and said this will be fair, or whether this is just sort of a culmination of a process that's been moldering [*sic*] along for some time.

MR. MOYER: It's very important—and I think very important to the Secretary who is newly responsible for these—for the anti-dumping and counter-bailing [*sic*] duty laws—that the administration of those programs be conducted in a sensible, efficient, current, effective basis and recent changes in the law reflect heightened expectations in the Congress that that be the case.

We took over a program and the system in which there was some backlog and this is perhaps the most celebrated of the cases that we inherited.

We faced, at that point, a backlog going back a number of years. The Secretary concluded—I concluded that we should examine very carefully and very quickly whether settlement in this case made sense. After we made that initial settlement, the Secretary then gave the go-ahead to see if we could—if there was any likelihood of reaching a settlement on what we viewed as fair terms.

At the conclusion of that process, the Secretary made the final decision to approve the settlement that we intended to.

MR. HARTWIG: Over here, please.

Q. You said the case has been settled on very fair terms to the U.S. and you have settled 50% of what you could feasibly shoot for in court. Is that a good ratio by the standards of these kinds of court cases? And my second question is do you have a figure for the total value of the Japanese TV sets that have come in to the U.S. in this period—'71-'79?

MR. MOYER: Second question first: just over $2 billion.

Q. That is for the period '71 to '79?

MR. MOYER: That's correct. I can be corrected on that, but that's my recollection. Just over $2 billion. To answer your first question on the fairness of the settlement—one can employ a variety of yardsticks and I could do that somewhat superficially—50 cents on the dollar for commercial litigation, I think, is technically regarded as a high and fair settlement. But really, more responsive to your question, the fairness of any settlements necessarily depends on the magnitude of the risk in going forward with claims, the costs of going forward both in resources and in real dollars, the time involved. One must also take into account, I think, that to some extent time is money, and the payment of "x" dollars per day is worth more in present day dollars than a similar payment collected 5 years hence.

Assessing all of those factors, the strength of the legal claims and the risks in going through the process in full measure, in my judgment, is a very fair settlement.

Q. What happens to the investigations into illegal—allegedly illegal kickbacks that were being made—if I understand—by a grand jury across the country. This has been widely reported—

MR. MOYER: Criminal proceedings of any sort are unrelated to this settlement.

Q. I see. So what is this $10 million that we're talking about—maybe Mr. Caramagno might be able to address what exactly—

MR. MOYER: Those are civil penalties. I'll let Mr. Caramagno address that.

MR. CARAMAGNO: These are compromise [*sic*] we accepted in lieu of the possible assessment of penalties. We have only assessed one penalty in this case and the question is whether that was a valid assessment. We have assessed no other penalties. Some of our investigations are—and with repsect [*sic*] to cases about which we have knowledge and which there have been disclosure to—

Q. Are they criminal investigations or proceedings?

MR. CARAMAGNO: They may or may not proceed.

MR. HARTWIG: Other questions?

Q. You said earlier that there would be some further details on these 592 cases. I assume that that's what your [*sic*] referring to—these 4 cases and the breakdown of who the particular companies are and what the duties were?

MR. MOYER: There are 10 companies involved. Four have already executed settlement agreements. We can indicate the names of the companies without indicating any individual settlement amounts. Those four companies are Sears Roebuck, Penneys, Montgomery Wards and White Stores.

Incidentally, it may not be available yet, but there will be available a list of—a full list of the 22 companies that have signed agreements thus far.

Q. Could you explain again simply what this payment is about? These four companies have agreed to settle claims of $10 million for what?

MR. MOYER: For so-called section 592 cases. Those are civil investigations that relate to invoicing, recordkeeping, bookkeeping, processes associated with imports. I will refer the expert on my left.

MR. CARAMAGNO: Section 592 allows the assessment of penalties of foreign states [*sic*] against the Commerce of the United States by use of false statements, false practices and we were

investigating a variety of importers and manufacturers. Offers in compromise were made to it. We accepted those in lieu of going any further. The settlement procedure was relatively carefully considered in line with our usual mitigation process and we have guidelines for mitigating penalties. We try to do them in an orderly fashion. We consider litigation risks, the fact that we had not had the benefit of the other person's point of view, nor the benefit of complete investigation and we accepted settlements that we considered fair.

Q. This is the reverse side, therefore, of the criminal cases—

MR. CARAMAGNO: I wouldn't say it's the reverse side, it's the civil side.

Q. Of these civil cases which are not affected, you said, by this settlement.

MR. CARAMAGNO: No, very separate. The criminal cases that are—

Q. Was the Justice Department brought into this settlement procedure at all?

MR. MOYER: Well, I might clarify the role of the Justice Department because Justice is the signatory to many of these settlement agreements. It's [*sic*] participation in these agreements, however, is a function of pending collection suits, covering the 1971 to 1973 period. We will also have available for you, although I suspect we don't have them yet, some sample settlement agreement forms, if you are interested. They vary in some respects in that some companies have 592 cases, some didn't. Others were the subject of collection suits, while others were not.

The Justice Department participation in these settlements is limited to those civil collection actions relating to the 1971-1973 period.

MR. HARTWIG: Question back here.

Q. You say future reviews after these agreements will be based upon the procedure of the private trade agreement act

and not the commodity tax approach. Could you elaborate on that, I mean, is it—

MR. MOYER: Yes, I can elaborate to some extent. One of the issues in this proceeding was—involved the assessment of fair market value in Japan and one of the questions involved was how best to assess that value. In most cases, it is done in a transaction by transaction documentation fashion which involves simply going back and documenting the wholesale price with the comparable sales price in the home country.

For a variety of reasons, that proves not feasible for significant periods of time covered by this. As a result, in 1977, valuation of home market value was made by the so-called commodity tax basis. In a word, that is a procedure whereby Customs and the Treasury Department at that time utilized a formula incorporated in the tax code of Japan and used by the Japanese government in arriving at comparable prices for tax purposes. I'm oversimplifying a bit, but it's a shorthand formula method of arriving at fair market value in the home country.

Prospectively, after March 30, 1979, assessments will be made on the traditional documentation basis.

Q. Can you tell me which side that is a concession to? I mean, which side disliked it?

MR. MOYER: Well, it certainly was challenged by the importing company and was a central issue in this matter.

MR. HARTWIG: Any more questions?

Q. Is there any reason why you can't give us a breakdown—a dollar breakdown of the various settlements that have been made, I mean rather than this overall total?

MR. MOYER: I think that at this point it would be inappropriate for us to indicate on a company by company, dollar by dollar basis.

Q. When will you be doing that?

MR. MOYER: We frankly have concluded the last agreements just a few minutes ago, and my honest answer is we have not addressed that. Our inclination at this point is not to make that information available, but we shall review that.

Q. Can you do that? I mean, can you not make it available?

MR. MOYER: Well, that's what we will review.

MR. HARTWIG: One more question, over here.

Q. Can you state again the basis of your legal authority to settle these claims, because there seems to be some feeling on the Hill that Commerce, with the administering authority, does not have that power to settle claims, but that you are actually moving into rather dangerous domain.

MR. MOYER: I'd be happy to. It is Section 1617 of Title 19. That contains broad, almost categorical authority to compromise claims arising out of conference [*sic*] law. The result of the trade reorganization at the 1st of the year, a portion of that authority was transferred to the Secretary of Commerce, and specifically authority to settle claims arising under the anti-dumping and counter-bailing [*sic*] duty laws.

I have reviewed this issue. We have reviewed it with the Justice Department. I am satisfied that legal authority is ample.

MR. HARTWIG: Thank you very much, ladies and gentlemen.

Slip Op. 80-10

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE MALETZ, JUDGE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Memorandum and Order on Plaintiff's Motion for a Preliminary Injunction

[Plaintiff's motion granted.]

Decided December 9, 1980

Frederick L. Ikenson and *Philip J. Curtis* on the brief for the plaintiff.

Alice Daniel, Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch, on the brief), for the defendant.

MALETZ, Judge: Plaintiff, an American television manufacturer, moves for an order enjoining *pendente lite* the Secretary of Commerce, the Secretary of the Treasury, the Attorney General and the Commissioner of Customs, and their successors, agents and assigns, from implementing the terms of any settlement agreement entered into by or on behalf of the United States Department of Commerce, the United States Department of the Treasury, the United States Department of Justice and/or the United States Customs Service, and various importers of television receivers from Japan subject to the Secretary of the Treasury's finding of dumping, T.D. 71-76 (1971).

By way of background, on May 28, 1980 plaintiff brought an action in this court under section 516A of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. §1516a(a)(2)) challenging certain settlement agreements into which the United States had entered on April 28, 1980 with various importers of television receivers from Japan. The major portion of these settlement agreements related to claims arising out of a large backlog of unliquidated entries.

On June 27, 1980, plaintiff filed a verified complaint in which it detailed its grievances and alleged that the implementation of the settlement agreements would result in the unlawful forgiveness to plaintiff's competitors of hundreds of millions of dollars in antidumping liability on these unliquidated entries. As a first cause of action, the complaint asserted that the settlement was not authorized by 19 U.S.C. §1617 and thus was *ultra vires*, illegal and void.

Alternatively, as a second cause of action, the complaint alleged that even assuming 19 U.S.C. §1617 provided authority for the settlement, the Government officials who recommended and determined that the claims should be settled acted arbitrarily, capriciously, in bad faith and unlawfully. More specifically, the complaint alleged that the recommendations and the decision to settle the claims as well as the terms of the settlement were based on bad faith and improper motivations of persons in the Executive Branch. According to the complaint, the recommendations and decisions to settle, and the terms of the settlement were based primarily on political and other irrelevant considerations.

Following enactment of the Customs Courts Act of 1980, which became effective on November 1, 1980, plaintiff filed an amended complaint in this court on November 3, 1980 under 28 U.S.C. §1581(c) (a provision which gives the court jurisdiction over actions commenced under section 516A of the Tariff Act of 1930, as amended (19 U.S.C. §1516a)). Alternatively, the amended complaint was brought under 28 U.S.C. §1581(i) (a provision which was added by the Customs Courts Act of 1980

to grant broad residual jurisdictional authority to this court). It is undisputed that by virtue of §1581(i), this court has jurisdiction to entertain this action.

It is important to add by way of further background that on May 8, 1980, the Court of Appeals for the District of Columbia Circuit in *The Committee to Preserve American Television* (a.k.a. *Compact*) v. *Miller*, C.A.D.C. No. 79-1948, issued an injunction pending appeal which is the same in substance as the preliminary injunction sought by plaintiff here. However, the enactment of the Customs Courts Act of 1980 makes imminent the dissolution by the D.C. Circuit of its injunction in view of the exclusivity of subject matter jurisdiction which Congress has now vested in this court. Indeed, the appellants in the *Compact* case have filed a motion with the D.C. Circuit to transfer that case to this court. The Government, on the other hand, opposes the motion to transfer and urges that the D.C. Circuit dissolve its injunction pending appeal. In this posture the injunction pending appeal could be dissolved by the D.C. Circuit at any time. Given that circumstance, plaintiff's motion in this court for a preliminary injunction is ripe for decision at this time.

Nor is there any question as to the power of this court to issue a preliminary injunction in appropriate circumstances. For the Customs Courts Act of 1980 vests this court—renamed the United States Court of International Trade—with "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. §1585. Thus, the Act specifically authorizes the court to issue injunctions. 28 U.S.C. §2643(c)(1). What is more, Congress intended "to grant the Court of International Trade remedial powers co-exclusive with those of a federal district court. * * * [Therefore] [w]hen a party requests the court to grant injunctive relief, the court is to be guided by the same factors utilized by a federal district court when it considers a request for a preliminary injunction." H.R. Rep. No. 96-1235, 96th Cong. 2d Sess. 61 (1980).

The factors utilized by district courts in considering a request for a preliminary injunction are set out in the leading case of *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958). There the court indicated that to prevail the petitioner must show (1) that there is a substantial likelihood that the petitioner will prevail on the merits; (2) that without the relief requested the petitioner will be irreparably injured; (3) that the issuance of the relief requested will not substantially harm other interested parties; and (4) that the public interest would be served by the relief requested. [1]

Recently, the D.C. Circuit in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), amplified these factors as follows:

> * * * [U]nder *Virginia Petroleum Jobbers* a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

Applying the *Virginia Petroleum/Holiday Tours* test to the present case, we find the following:

1. Likelihood that Plaintiff will Prevail on the Merits

The court has examined the record made in the case thus far, including the complaint; defendant's motion to dismiss for lack of jurisdiction and brief in support thereof; plaintiff's cross-motion for partial summary judgment on its first cause of

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[1] See also, e.g., *Asher* v. *Laird*, 475 F.2d 360, 362 (D.C. Cir. 1973); *Di Jub Leasing Corp.* v. *United States*, 1 CIT —, Slip Op. 80-9 at 15-16 (December 5, 1980).

action and its brief in support thereof and in opposition to defendant's motion to dismiss; defendant's cross-cross-motion for summary judgment and brief in support thereof and in opposition to plaintiff's motion for partial summary judgment; the amended complaint; and defendant's reply to plaintiff's opposition to defendant's motion to dismiss. [2] What is particularly significant is that several of the foregoing submissions set forth facts supported by accompanying exhibits with respect to the background of and circumstances surrounding the settlement agreements. Based on these facts which are largely uncontroverted, the court—without reference to plaintiff's first cause of action—is of the view that plaintiff has made out a substantial case on the merits on its alternative second cause of action alleging that Government officials in negotiating and executing the settlement agreements acted arbitrarily and in bad faith.

2. Irreparable Injury to Plaintiff

The court is of the opinion that if appropriate Government officials are not enjoined from implementing the settlement agreements, plaintiff stands to be irreparably injured. For one thing, plaintiff will have lost its right to judicial review. For another, the settlement if implemented would result in the allegedly illegal forgiveness of liability for hundreds of millions of dollars in dumping duties to plaintiff's competitors.

Defendant argues though that plaintiff's competitive position is not currently affected in an adverse manner by the importation of television receivers from Japan. Hence, defendant's position is that plaintiff would not be harmed by nonenforcement of the antidumping statutes with respect to past

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[2] In its reply to plaintiff's opposition to defendant's motion to dismiss, defendant agreed that by virtue of 28 U.S.C. §1581(i), as amended by the Customs Courts Act of 1980, the court has jurisdiction over the present action. Thus, defendant's motion to dismiss for lack of jurisdiction is now moot.

entries. However, Congress clearly recognized that domestic interests could be harmed by inadequate enforcement of the antidumping law with respect to past entries. This is evidenced by the administrative and judicial review made available by sections 751 and 516A of the Tariff Act of 1930, as amended (19 U.S.C. §§1675, 1516a), which enable American manufacturers to contest the amount of duty to be assessed on past entries. Even the section 751 annual review which is now being conducted involving television receivers from Japan does not pertain to current entries. Rather, the current investigation relates to the amount of duties to be assessed on entries made between April 1, 1979 and March 1, 1980. In short, Congress recognized that domestic industry could be injured by the failure to enforce the antidumping law adequately and provided a vehicle to assure that domestic interests could participate in administrative and judicial review.

3. The Effect on the Public Interest and on Third Parties

The defendant argues here—as it did in the Court of Appeals for the District of Columbia Circuit—that the enjoining of the settlement agreements would work a hardship on the public interest and third parties. Thus, the defendant states that the settlement agreements at issue were concluded on April 28, 1980 while the injunction pending appeal was not issued by the Court of Appeals until May 8, 1980. During the interim period, defendant states, Government agencies and private parties took a number of steps in reliance upon the agreements. Specifically, the Department of Justice caused the dismissal with prejudice of two collection suits. [3] Also, according to defendant, the Customs Service and the private parties to the agreements took unspecified steps also in reliance upon the agreements.

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[3] The dismissal of these two collection suits alone would not warrant the mooting of litigation challenging the legality of the settlement agreements, as apparently the Court of Appeals for the District of Columbia found.

It is to be noted, however, that the parties to the agreements were obviously concerned that the agreements could come under legal attack. For the agreements contained the following provision:

> 8. This Agreement shall be null and void in the event that there be, and upon, a judicial decision final by appeal or, if the time to appeal shall have expired without an appeal having been taken, that the United States did not have the right, power or authority to enter into this Agreement. Within ten (10) calendar days after such decision, the United States shall refund the consideration paid by the Company, pursuant to paragraph 2 above. Nevertheless, if, at the time the agreement be finally declared null and void, the entries of television receivers subject to T.D. 71-76 made prior to April 1, 1979, have been liquidated or reliquidated with no assessment of antidumping duties, and such liquidations or reliquidations have become final or conclusive upon all persons, the applicable consideration paid by the Company shall not be refunded.

Defendant proceeds to argue that unless the injunction is discontinued (and plaintiff's case is permitted to become moot), the settlement agreements might be repudiated. Such a development, defendant suggests, could lead to litigation with importers and "the diversion of substantial resources needed for the effective future enforcement of T.D. 71-76 into an effort to defend past actions." "The failure of this latter effort," defendant continues, "would result in the defeat of the very objective which plaintiff seeks to achieve—the payment of dumping duties by the importers of Japanese television sets during a substantial period of time—and the possible impairment of the effort to effectively enforce T.D. 71-76 in the future."

In essence, defendant's position is that the public interest would be best served by mooting the present controversy. But this course, precluding as it would judicial inquiry into the Government's alleged failure to administer the antidumping law with respect to television receivers from Japan, would scarcely be consistent with the public interest. For the public interest lies in the faithful execution by the Executive Branch of the laws enacted by Congress. In this proceeding, plaintiff

has raised serious issues concerning the Executive Branch's exercise of its responsibilities under the antidumping law with respect to television receivers from Japan. So considered, the mooting of this controversy, which is what would result in the absence of an injunction, would constitute a disservice to the public interest.

In view of the foregoing, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is granted; and it is further

ORDERED that the Secretary of Commerce, the Secretary of the Treasury, the Attorney General, and the Commissioner of Customs, and their successors, agents, and assigns are enjoined, pending the resolution of this case, from implementing the terms of any settlement agreement entered into by or on behalf of the United States Department of Commerce, the United States Department of the Treasury, United States Department of Justice, and/or the United States Customs Service, and various importers of television receivers subject to T.D. 71-76; and it is further

ORDERED that the Secretary of the Treasury and the Commissioner of Customs and their successors, agents, and assigns are enjoined, pending the resolution of this case, from liquidating any entries of television receivers subject to the finding of dumping, T.D. 71-76, which were entered, or withdrawn from warehouse, for consumption on or prior to March 31, 1979.

/s/ Herbert N. Maletz
HERBERT N. MALETZ, Judge

Slip Op. 80-11

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE MALETZ, JUDGE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Memorandum and Order on Defendant's Motion for a Protective Order

The court has before it defendant's second motion for an order relieving defendant of the obligation to respond to plaintiff's discovery, or, alternatively, to extend the time within which defendant must respond to plaintiff's discovery.

In considering this motion, the court has examined the record in the case thus far, including the complaint; defendant's motion to dismiss for lack of jurisdiction and brief in support thereof; plaintiff's cross-motion for partial summary judgment on its first cause of action and its brief in support thereof and in opposition to defendant's motion to dismiss; defendant's cross-cross-motion for summary judgment and brief in support thereof and in opposition to plaintiff's motion for partial summary judgment; the amended complaint; and defendant's reply to plaintiff's opposition to defendant's motion to dismiss.

On the basis of uncontroverted facts appearing in the above record (see *Zenith Radio Corporation* v. *United States*, 1 CIT—, Slip Op. 80-10 at 6-7, December 9, 1980), the court has concluded that plaintiff has made a sufficiently strong showing of bad faith so as to warrant discovery. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971); *KFC Nation-*

al Management Corp. v. *NLRB*, 497 F.2d 298, 305 (2d Cir. 1974); *National Nutritional Foods Assn.* v. *FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974); *Singer Sewing Machine Co.* v. *NLRB*, 329 F.2d 200, 208 (4th Cir. 1964); *Abbott Laboratories* v. *Harris*, 481 F. Supp. 74, 78 (N.D. Ill. 1979); *Tenneco Oil Co.* v. *Doe*, 475 F. Supp. 299, 316 (D. Del. 1979); *Quincy Oil Co., Inc.* v. *FEA*, 468 F. Supp. 383, 388 (D. Mass. 1979); *Ruppert* v. *Washington*, 366 F. Supp. 686, 690 (D.D.C. 1973), *aff'd*, 543 F.2d 417 (D.C. Cir. 1976); *Bank of Dearborn* v. *Saxon*, 244 F. Supp. 394, 402-403 (E.D. Mich. 1965); *Jarrott* v. *Scrivener*, 225 F. Supp. 827, 829 (D.D.C. 1964); *Union Savings Bank of Patchogue* v. *Saxon*, 209 F. Supp. 319 (D.D.C. 1962).

For the foregoing reasons it is hereby

ORDERED that defendant's motion for an order relieving it of the obligation to respond to plaintiff's discovery is denied, and it is further

ORDERED that defendant's motion in the alternative for an order extending the time within which it must respond to plaintiff's discovery is also denied, and it is further

ORDERED that defendant shall respond to Plaintiff's First Request for Production of Documents within 40 days after December 15, 1980, and defendant shall respond to Plaintiff's First Interrogatories within 50 days after December 15, 1980.

/s/ Herbert N. Maletz
HERBERT N. MALETZ, Judge
Dec. 12, 1980

Slip Op. 81-19

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE MALETZ, JUDGE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

On Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross-Motion for Summary Judgment

[Plaintiff's motion denied and defendant's motion granted in part and denied in part.]

Decided February 27, 1981

Frederick L. Ikenson and *Philip J. Curtis* for the plaintiff.

Thomas S. Martin, Acting Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch, on the briefs), for the defendant.

MALETZ, Judge: Plaintiff, a domestic manufacturer of television sets, brought this action challenging as unlawful certain settlement agreements into which the United States had entered on April 28, 1980 with various importers of television sets from Japan. As a first cause of action, the complaint alleges that the settlement was not authorized by statute. Alternatively, as a second cause of action, the complaint alleges that even assuming the existence of statutory authority for the settlement, the Government officials who recommended and determined that the claims should be settled acted arbitrarily, capriciously, in bad faith and unlawfully. It is undisputed that by virtue of 28 U.S.C. § 1581(i) — which was

provided for by the Customs Courts Act of 1980 (94 Stat. 1727) — this court has jurisdiction to entertain the action.

Plaintiff has moved for partial summary judgment on its first cause of action and defendant has cross-moved for summary judgment on the entire case. [1]

The background facts are as follows: On March 10, 1971, the Secretary of the Treasury issued a finding of dumping of television sets from Japan, thereby making such sets subject to antidumping duties. [2] T.D. 71-76, 36 Fed. Reg. 4597 (1971). From the date of this finding through 1979, most of these duties were not collected. On March 28, 1980, the Secretary of Commerce [3] announced an administrative review of the dumping finding (45 Fed. Reg. 20511), as required by section 751 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979 (19 U.S.C. § 1675). [4] On April 28, 1980, prior to the

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[1] Plaintiff's motion for partial summary judgment was originally filed as a cross-motion to defendant's motion to dismiss for lack of jurisdiction, and defendant's cross-motion for summary judgment was originally filed as a cross-cross-motion. Since defendant's motion to dismiss was rendered moot by the passage of the Customs Courts Act of 1980, the present motions are referred to as "plaintiff's motion for partial summary judgment" and "defendant's cross-motion for summary judgment."

[2] The Secretary of the Treasury's dumping finding was made pursuant to section 201(a) of the Antidumping Act of 1921, as amended (19 U.S.C. § 160(a)), an enactment which was repealed by the Trade Agreements Act of 1979, Pub. L. No. 96-39, Title I, § 106(a), 93 Stat. 193. However, pursuant to section 106(a) of the Trade Agreements Act of 1979, this dumping finding remained in effect.

[3] The Secretary of the Treasury's responsibility to administer antidumping matters has been transferred to the Secretary of Commerce by Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69273 (1979).

[4] Section 751 requires the Secretary to conduct a periodic review and determination of antidumping duties.

completion of this administrative review, the Secretary of Commerce settled all claims for antidumping duties arising from entries of the sets from July 1, 1973 to March 31, 1979. Plaintiff then filed this action challenging the lawfulness of this settlement.

Against this background, we consider plaintiff's motion for partial summary judgment on its first cause of action. [5] Specifically, plaintiff contends that the settlement is not authorized by section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617) and is therefore *ultra vires*, illegal and void. Section 617 reads as follows:

> Upon a report by a customs officer, United States attorney, or any special attorney, having charge of *any claim arising under the customs laws*, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury. [Emphasis added.] [6]

According to plaintiff, section 617 only authorizes the settlement of *liquidated claims* for antidumping duties. [7] In this

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[5] Previously, this court concluded "that plaintiff has made out a substantial case on the merits on its alternative second cause of action * * *" and issued a preliminary injunction restraining the implementation of the settlement agreement. *Zenith Radio Corporation* v. *United States*, 1 CIT — , Slip Op. 80-10, p. 7 (Dec. 9, 1980). The court's memorandum and order specifically noted, however, that the decision to issue the preliminary injunction was made "without reference to plaintiff's first cause of action * * *." *Ibid.*

[6] The Secretary of the Treasury's functions under section 617 have been transferred to the Secretary of Commerce, insofar as those functions relate to the settlement of claims for antidumping duties. Reorg. Plan No. 3 of 1979, *supra*, § 5(a) (1) (G).

[7] Liquidation is the final computation of duties accruing on an entry. See 19 C.F.R. § 159.1. Most of the entries which are the subject of the disputed settlement are unliquidated.

connection, plaintiff observes—correctly—that the legislative history of section 617 is essentially silent. However, in support of its position that section 617 authorizes only the settlement of liquidated claims for duties, plaintiff relies heavily upon the history of Rev. Stat. § 3469 which was repealed in 1978. See 92 Stat. 2679.

Rev. Stat. § 3469 at the time relevant here read as follows:

> Upon a report by a district attorney, or any special attorney or agent having charge of *any claim in favor of the United States*, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the solicitor of the treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. * * * [Emphasis added.]

Based on the similarity of language between the two provisions, plaintiff argues that section 3469 was the precursor of section 617 and therefore that the case law and administrative construction of section 3469 apply for the most part to section 617.

As for case law, plaintiff relies on *United States* v. *George*, 25 F. Cas. 1277 (C.C.S.D.N.Y. 1869) which, it says, supports its position that section 617 authorizes only the settlement of liquidated claims. In *George*, certain informers claimed entitlement to a portion of sums that were paid to the Government under a compromise agreement. The informers contended that the sums constituted fines or penalties in which they had a right to share. The Government on the other hand argued that since the funds were paid by way of compromise under section 10 of the Act of March 3, 1863, 12 Stat. 740—which was a virtually identical predecessor provision to section 3469—such funds were duties and that the informers therefore were not entitled to a share thereof. The court rejected the Government's argument and held (1) that the compromise had no legal effect on the character of the funds and (2) that a portion of the funds constituted fines or penalties in which the informers

were entitled to share. Plaintiff emphasizes that the court in *George* added that section 10 "might well be held to confer no power in regard to claims not in suit." 25 F. Cas. at 1279. But this statement was simply dictum which can scarcely be regarded as dispositive of the issue here.

As for administrative construction, plaintiff relies upon various opinions of the Attorney General construing section 10 and its successor section 3469 in which the Attorney General concluded that those provisions were enacted for the benefit of the United States revenue and (1) did not permit the Secretary of the Treasury to exercise indirectly powers which Congress specifically conferred on other agencies; (2) did not authorize the settlement of claims for real property; (3) did not permit hardship to the debtor to be taken into consideration by the Secretary; and (4) did not include the Comptroller of the Treasury as an "agent." However, these opinions of the Attorney General have no relevance here.

Equally without merit is plaintiff's assertion in its opening brief that the legislative history of section 3469 shows that that section only authorized the settlement of claims for uncollected judgments. The fact of the matter is that section 3469 is not so limited as plaintiff itself concedes in its reply brief.

Nor is there any legislative history indicating that Congress intended that section 617 be construed in light of the history of section 3469. Section 617 was originally enacted in 1922 (42 Stat. 987) and provided specifically for the settlement of claims arising under the customs laws. Significantly, when section 617 was adopted, section 3469 was neither repealed nor modified and thus continued to provide authority for the settlement of claims other than those arising under the customs laws.

The important point is that the language of section 617 differs in several significant respects from the language of section 3469. For example, section 617 is applicable to "any claim arising under the customs laws," whereas section 3469 pertains to "any claim in favor of the United States." Thus the inescapable conclusion is that in enacting section 617, Congress intended to provide a mechanism for the settlement of claims

arising under the customs laws which would be different from the mechanism provided by section 3469. This consideration militates against construing section 617 in accordance with the history of section 3469. For "[w]here * * * words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning." *Klein* v. *Republic Steel Corp.*, 435 F.2d 762, 765-766 (3d Cir. 1970). See also, e.g., *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133, 155 (N.D. Cal. 1967); *Sol Kahaner & Bro.* v. *United States*, 71 Cust. Ct. 97, 102, C.D. 4480, 372 F. Supp. 1393, 1398 (1973), *aff'd*, 62 CCPA 35, C.A.D. 1141, 509 F.2d 1186 (1975).

What is more, the language of section 617 is clear and the court is therefore dutybound to interpret the section in accordance with its plain meaning. See, e.g., *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978). It is quite true that statutory clarity does not bar a court's consideration of legislative history. See, e.g., *Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. 1, 10 (1976); *Hunt* v. *Nuclear Regulatory Commission*, 611 F.2d 332, 336 (10th Cir. 1979), *cert. denied*, 445 U.S. 906 (1980). Nonetheless, the plain language of a statute must prevail in the absence of legislative history clearly indicating that the Congressional intent differed from that manifested by the language used. See *United States* v. *Oregon*, 366 U.S. 643, 648 (1961), *reh. denied*, 368 U.S. 870 (1961); *United States* v. *United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir. 1973), *cert. denied*, 414 U.S. 909 (1973). Measured by this standard, absent here is any legislative history indicating that Congress intended section 617 to be given a meaning other than one based on its plain language.

Regarding the plain language, plaintiff argues that the word "claim" as used in section 617 means only claims for liquidated duties, i.e., claims for a sum certain. However, it is axiomatic that a claim by the United States for the appropriate duties arises upon the entry of a shipment of merchandise into the customs territory of the United States. Indeed, imported mer-

chandise may not be released to an importer unless estimated duties or a bond for duties is deposited at the time of entry. 19 U.S.C. § 1505.

It is true that the amount of the claim for duties may be uncertain until liquidation occurs. Nevertheless, the claim for duties exists and an importer obtains possession of goods which he imports subject to the claim of the United States.

Here, the importers of television sets covered by the dumping finding obtained the goods but only subject to the claim of the United States for the duties to be ultimately assessed upon liquidation. Thus, the United States possessed a claim against the importers even though the exact amount of the claim had not been fixed through the process of liquidation. [8]

Alternatively, plaintiff argues that if section 617 is construed as authorizing the settlement of claims prior to the completion of the administrative review required by section 751 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979 (19 U.S.C. § 1675), Congress' purpose in passing the Trade Agreements Act, i.e., the speedy and efficient collection of antidumping duties, would be frustrated. While plaintiff cites no portion of the Trade Agreements Act or its legislative history explicitly stating that it was Congress' intent to limit the scope of secion 617, it argues that the passage of that Act impliedly limited the scope of that section.

This court should of course construe section 617 so as to give effect to the section as a whole. *Weinberger* v. *Hynson, West-*

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[8] In its ordinary meaning, the word "claim" is a broad comprehensive word including within its scope "a calling * * * for something due." *Webster's Third New International Dictionary of the English Language* (1968). A "claim" has been defined for purposes of the Federal Rules of Civil Procedure as "the aggregate of operative facts which give rise to a right enforceable in the courts." *Original Ballet Russe* v. *Ballet Theatre*, 133 F.2d 187, 189 (2d Cir. 1943). The fact that the exact amount of the claim is not fixed until liquidation is irrelevant to the question of whether a "claim" exists prior to that date.

cott & Dunning, 412 U.S. 609, 633 (1973); *Certified Color Mfrs. Ass'n* v. *Mathews*, 543 F.2d 284, 296 (D.C. Cir. 1976). Moreover, it is presumed that in enacting section 751 Congress was aware of its prior enactment of section 617. See, e.g., *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979); *In re Vinarsky*, 287 F. Supp. 446, 449 (N.D.N.Y. 1968). And it is also presumed that Congress intended both statutes to be interpreted as fully effective. See, e.g., *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

Obviously, these presumptions are not irrebuttable. Nevertheless, repeal of a statute by implication is not favored. *FAA Administrator* v. *Robertson*, 422 U.S. 255, 265 (1975). Further, this court should avoid an interpretation of section 617 rendering it only partially effective. *Certified Color Mfrs. Ass'n* v. *Mathews, supra*, 543 F.2d at 296. Thus sections 617 and 751 are each to be regarded as effective unless there is clear indication that Congress intended otherwise. *FAA Administrator* v. *Robertson, supra*, 422 U.S. at 266. Section 751 should therefore not be read to create an implied exception to, or limitation of, section 617 in the absence of a demonstrated repugnancy between the two provisions. *Morton* v. *Mancari, supra*, 417 U.S. at 551.

No such repugnancy exists here since the two provisions reflect different Congressional concerns and apply to different functions of the Secretary. The purpose of section 617 is to provide the Secretary with the authority to settle claims for duties and to outline the procedures to be followed and the factors to be weighed in the course of determining whether a given claim for duties should be settled.

The purpose of section 751 is entirely different. [9] That section provides in part that where there has been a finding of

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[9] The relevant portions of section 751 (19 U.S.C. § 1675) read as follows:

(a) *Periodic review of amount of duty.*—

dumping, the Secretary shall review and determine the amount of antidumping duty to be assessed by determining the

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(1) *In general.*—At least once during each 12-month period beginning on the anniversary of the date of publication * * * an antidumping duty order under this title or a finding under the Antidumping Act, 1921, * * * the administering authority [i.e., the Secretary of Commerce], after publication of notice of such review in the Federal Register, shall—

* * * * * * *

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, * * *

* * * * * * *

and shall publish the results of such review, together with notice of any * * * estimated duty to be deposited * * * in the Federal Register.

(2) *Determination of antidumping duties.*—For the purpose of paragraph (1)(B), the administering authority shall determine—

(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

* * * * * * *

(d) *Hearings.*—Whenever the administering authority of the Commission conducts a review under this section it shall, upon the request of any interested party, hold a hearing in accordance with section 774(b) in connection with that review.

difference between the foreign market value and United States price of the imported merchandise. Upon the request of an interested party, the Secretary must hold a hearing regarding his review and determination of antidumping duties. These procedures are designed to facilitate the speedy assessment of antidumping duties and to provide designated parties a greater role in these determinations. See H.R. Rep. No. 96-317, 96th Cong., 1st Sess. 72 (1979); S. Rep. No. 96-249, 96th Cong., 1st Sess. 80-81 (1979). It is to be added that these determinations are subject to judicial review under section 516A of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a).

There is no conflict between the procedures required by section 751 and those required by section 617. Under section 617 before the Secretary may settle a claim, he must receive a report from the Government official having charge of the claim showing "the facts upon which [the] claim is based, the probabilities of a recovery and the terms upon which the [claim] may be compromised * * *." Upon receipt of this report, and upon the recommendation of the General Counsel of the Department of Commerce that the claim be compromised, the Secretary may settle the claim. Any person adversely affected by the decision to settle may then seek judicial review of the Secretary's action. Considering that judicial review is thus available and that settlement may expedite the collection of antidumping duties, these procedures do not frustrate the Congressional purpose underlying section 751.

In sum, section 617 and section 751 are separate and distinct statutes. Nothing in the terms or the legislative history of section 751 in any way refers or relates to, much less derogates from, the Secretary's authority under section 617. Clearly, had Congress intended that the authority contained in section 617 be modified in any way by the Trade Agreements Act of 1979, it would have so stated. Given these facts, the court cannot agree with plaintiff's contention to the effect that Congress impliedly limited the scope of section 617 when it enacted section 751 into law.

In view of the foregoing, plaintiff's motion for partial summary judgment on its first cause of action is denied; defendant's cross-motion for summary judgment is granted as to plaintiff's first cause of action and denied without prejudice as to plaintiff's second cause of action for the reasons stated in this court's memorandum and order of December 9, 1980. See note 5, *supra*.

/s/ Herbert N. Maletz
HERBERT N. MALETZ, Judge
Feb. 27, 1981

Slip Op. 82-51

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE MALETZ, JUDGE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Dated: June 29, 1982
Memorandum and Order

MALETZ, Judge: This is a motion by the Government to dissolve the preliminary injunction in this case restraining the Government from implementing settlement agreements it entered into with importers of television receivers from Japan. The Government argues that given the decision by the Court of Customs and Patent Appeals in *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, No. 81-24 (March 11, 1982) (petition for rehearing denied on May 13, 1982), that this court did not have jurisdiction to entertain this action, it is clear that Zenith has no chance of success on the merits of its case and that the public interest weighs heavily in favor of a dissolution of the preliminary injunction.

At the outset, it will be noted that the Court of Customs and Patent Appeals has (over the Government's objection) granted Zenith's motion to stay its mandate in *Montgomery Ward* until July 21, 1982 to afford Zenith time to file a petition for a writ of certiorari to the Supreme Court. Nor is there any doubt that important and novel questions of statutory and administrative law are presented for Supreme Court review. But were the preliminary injunction to be dissolved, the Government would

implement the settlement agreements, thus mooting the controversy and preventing the Supreme Court from exercising jurisdiction to decide the questions, should it elect to do so.

The Government, however, suggests that if this court dissolves the preliminary injunction, Zenith could still seek an injunction pending the filing of a petition for certiorari from the Court of Customs and Patent Appeals and if that application is denied, seek an injunction from the Supreme Court. But such a course would be singularly inappropriate. For it would create an emergency situation, which in turn would generate a wasteful and hurried effort by members of the judiciary and the parties—at a time when Zenith has represented that its petition for certiorari is soon to be filed.

The motion to dissolve the preliminary injunction is denied.

/s/ Herbert N. Maletz
HERBERT N. MALETZ, Judge